Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MICHAEL GONZALES,
Petitioner,

v.

NATIONAL BOARD OF MEDICAL EXAMINERS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. ("ADA"), requires that administrators of professional examinations provide accommodations to individuals with disabilities.

Title III of the ADA concerns public accommodations, including testing on professional examinations administered by private companies. Title I of the ADA concerns discrimination in employment. The ADA protects those individuals who are "substantially limited" in a major life activity. The Title I regulations state that with regard to the major life activity of "working," an individual must be compared to others of similar training, skills, and abilities. The Title III regulations contain no such specific provision.

The question presented is:

1. Whether the United States Court of Appeals for the Sixth Circuit erred by refusing to apply the regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") pursuant to Title I of the Americans with Disabilities Act, and in particular the definition of "substantially limits" as it relates to the major life activity of "working," in the context of a Title III challenge to a private entity's refusal to apply that definition, where such refusal has the effect of precluding an individual from pursuing his chosen career?

PARTIES TO THE PROCEEDING

Petitioner

Michael Gonzales, an individual who has no corporate affiliation.

Respondent

National Board of Medical Examiners.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, at 1a-38a) is reported at 225 F.3d 620 The opinion and order of the district court (App., *infra*, at 39a-54a) is reported at 60 F. Supp. 3d 703.

JURISDICTION

The court of appeals issued its opinion on August 22, 2000. Petitioner's request for rehearing en banc was denied by the court of appeals on November 20, 2000. (App., *infra*, at 55a-56a.) On February 7, 2001, Justice Stevens extended the time within which to file a petition for writ of certiorari to and including March 21, 2001. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS

Several provisions of the ADA and its implementing regulations are relevant to this petition. 42 U.S.C. §12189 (part of Title III of the ADA) provides that:

> Any person that offers examinations . . . related to applications, licensing, certification, or credentialing for . . . professional, or trade purposes shall offer such examinations . . . in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

Title III of the ADA also provides that "discrimination includes":

> . . . a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations . . . .

42 U.S.C. §12182(b)(2)(A).

The Department of Justice ("DOJ") regulations implementing Title III provide that:

> An examination covered by this section must assure that (i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's sensory, manual, or speaking skills . . . .

28 C.F.R. §36.309(b)(1)(i).

The ADA states that "disability" means:

> . . . a physical or mental impairment that substantially limits one or more of the major life activities.

42 U.S.C. §12102(2)(A).

The Appendix to the Title III regulations states that a person is disabled under the ADA "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R. Part 36, App. B.

With regard to the major life activity of "working," the Title I regulations state that:

> The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. §1630.3(j).

STATEMENT OF THE CASE

1. Congress enacted the ADA to provide a "clear and comprehensive national mandate" to eliminate discrimination against persons with disabilities. 42 U.S.C. §12101(b)(1). In addition to prohibiting intentional discrimination against those with disabilities, the ADA also

requires that entities provide reasonable accommodations to such persons concerning public accommodations. 42 U.S.C. §12182(b)(2)(A).

One threshold question under the ADA is whether an individual has a "disability" which entitles him to protection under the Act. A "disability" under the ADA includes a mental impairment which "substantially limits one or more of the major life activities." 42 U.S.C. §12102(2)(A). The ADA does not define the terms "substantially limit," or "major life activities." The ADA charged the Department of Justice ("DOJ") with issuing regulations under Title III of the ADA concerning public accommodations, and charged the Equal Employment Opportunity Commission ("EEOC") with issuing regulations under Title I of the ADA concerning employment. 42 U.S.C. §12186(b); 42 U.S.C. §12116.

The DOJ's regulations provide that an individual is "substantially limited" when that individual is "restricted as to the condition, manner, or duration" of performing a particular major life activity as compared to the general population. 28 C.F.R. Part 36, App. B. The EEOC's regulations alter that standard somewhat when dealing with the major life activity of "working." As to "working," an individual is not compared to those in the general population. Instead, an individual is disabled in his ability to work if he is restricted in his ability to perform a class of jobs "as compared to the average person having comparable training, skills and abilities." 29 C.F.R. §1630.3(j).

Where an individual believes that his ADA Title III rights have been violated, that individual may bring an action in federal district court, as Petitioner did in this matter. 42 U.S.C. §12188(a)(1).

2. Petitioner has difficulty reading which impacts his ability to function in a wide variety of activities. For example, he has great difficulty reading highway signs while driving. When he shops in stores, he feels compelled to sign credit card receipts blindly because reading them would take him so long that it would make other customers angry. When reviewing the complaint filed in the district court, one of his attorneys had to read the document to Petitioner line by line so that he could understand it. App., *infra*, at 27a.

Petitioner progressed in his academic career through his undergraduate years without formal accommodations. Petitioner graduated from high school with a grade point average of 4.3 out of 5. As an undergraduate he continued to achieve good grades during his first two years at the University of California at Davis ("UCD") without formal accommodations. Moreover, Petitioner was able to score well enough on standardized examinations to enroll in post-secondary educational institutions. App., *infra*, at 21a.

Petitioner received very significant informal accommodations during these years which made these achievements possible. For example, his high school teachers allowed him to redo unsatisfactory assignments and turn in untimed extra-credit projects. Petitioner also achieved passing grades without formal accommodations in college by employing strategies that allowed him to minimize the amount of reading he did. For example, he tape recorded lectures, and had his friends read their class notes to him. App., *infra*, at 28a-29a.

3. In response to lower than expected results on some standardized tests, Petitioner was first tested for a learning disability in 1994 when he was a student at UCD. Dr. Gordon L. Ulrey, an Associate Clinical Professor of

Psychology at UCD, examined Petitioner, and concluded that Petitioner had a learning disability "related to slowness in language processing." Dr. Ulrey suggested that Petitioner be given 50% more time on his examinations. He also suggested that Petitioner record lectures and review written lecture notes. App., *infra*, at 3a-4a.

Based on Dr. Ulrey's report, UCD provided Petitioner with accommodations for his remaining undergraduate years, including extended time to take tests, assistance with note-taking, and permission to tape classroom lectures. App., *infra*, at 4a-5a.

4. Petitioner enrolled at the University of Michigan Medical School ("UMMS") in the Fall of 1996. Petitioner requested academic accommodations based on Dr. Ulrey's report, and was granted essentially the same accommodations as he had obtained from UCD: extended time to take tests, assistance with note-taking, and permission to tape classroom lectures. App., *infra*, at 4a-5a.

By 1998, Petitioner had successfully completed two years of medical school. In order to continue into his third year at UMMS, however, Petitioner was required to pass the United States Medical Licensing Examination ("USMLE") Step 1 examination, which is administered by Respondent. App., *infra*, at 2a. The Step 1 is a graduation requirement for most medical schools, and is a requirement for licensure to practice medicine anywhere in the United States.[1]

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[1] Since this case was decided by the Sixth Circuit, the UMMS has granted Petitioner special permission to continue through medical school without passing the Step 1 examination. Achieving a passing score on the USMLE Step 1 examination,

Petitioner requested an accommodation of extra time to take the Step 1 examination from Respondent, but his request was denied. Respondent's denial was based on the opinion of Dawn Flanagan, Ph.D., who reviewed Petitioner's USMLE file, but did not examine Petitioner. App., *infra*, at 5a.

Petitioner took the Step 1 in June 1998 without accommodations, and failed the examination. App., *infra*, at 5a.

5. In October 1998, Petitioner was examined by Dr. Bruno Giordani, Associate Professor of Psychology, Director of the Neuropsychology Clinic, and Associate Director of the Neuropsychology Division of the University of Michigan. App., *infra*, at 5a-6a.. Based on formal testing, a clinical interview, and a review of Petitioner's history, Dr. Giordani concluded that Petitioner met the American Psychiatric Association's generally accepted diagnostic criteria for Reading Disorder and Disorder of Written Expression. App., *infra*, at 5a-7a.

Petitioner again applied to take the Step 1 examination with accommodations, and submitted both Dr. Ulrey's and Dr. Giordani's reports as further evidence of his disability. Again, Respondent did not meet with or interview Petitioner. Instead, Respondent sent Petitioner's file to a clinical psychologist, George Litchford, Ph.D., who conducted a record review. App., *infra*, at 7a.

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however, remains a licensure requirement in order for Petitioner to be able to practice medicine anywhere in the United States.

Based on Dr. Litchford's report, Respondent again denied Petitioner's request for accommodation. Petitioner took the Step 1 examination for the second time without accommodation in October 1998, and, for the second time, failed. App., *infra*, at 7a-8a.

6. For the third time, Petitioner applied to take the Step 1 with accommodations. That request was again denied. App., *infra*, at 8a. Before taking the Step 1 for the third time, Petitioner filed suit in the district court, alleging that Respondent illegally refused to grant him additional time to take the Step 1 examination. Petitioner alleged that he was disabled in the major life activities of reading, writing, and working, and that such disabilities entitled him to the requested accommodation of extra time. Petitioner sought, *inter alia*, injunctive relief requiring Respondent to allow extended time for the Step 1 examination. App., *infra*, at 8a.

After an evidentiary hearing, the district court denied Petitioner's request for injunctive relief, finding that Petitioner had not established a likelihood of success on the merits because Petitioner is not disabled under the ADA. App., *infra*, at 8a-9a. The district court's opinion was based largely upon the testimony of Dr. Flanagan, who testified not only as to the opinion she provided to Respondent as to Petitioner's first request for accommodation, but also testified generally as an expert as to Petitioner's ability to read and write. Dr. Flanagan testified at the hearing that Dr. Giordani's and Dr. Ulrey's findings did not support a reading or writing disability, even though she conceded that her opinion was based upon a theoretical model that had not been empirically analyzed for purposes of treatment and diagnosis. App., *infra*, at 16a-17a, 32a. Even so, the district court rejected the opinions and testimony of those doctors who had personally examined and diagnosed Petitioner with a learning

disability in favor of Respondent's witnesses. App., *infra*, at 16a-17a, 31a..

7. Petitioner appealed the district court's denial of injunctive relief to the court of appeals. In a 2-1 decision, the court of appeals affirmed.

With regard to the major life activity of working, the court of appeals refused to apply the standard regarding the major life activity of "working' as promulgated by the EEOC in order to implement Title I of the ADA. App., *infra*, at 23a-24a.

REASON FOR GRANTING THE PETITION

I

The decision below that the Title I regulation regarding the major life activity of "working" should not be considered in a Title III case unnecessarily renders the ADA definition of "disability" internally inconsistent, and conflicts with a decision of the Second Circuit.

The court of appeals rejected Petitioner's argument that in the context of a Title III challenge to a barrier to employment, it should interpret the Title III regulations by reference to the Title I regulation regarding the definition of "substantially limits" as it related to the major life activity of "working." That decision puts the Sixth Circuit directly at odds with the Second Circuit on an important issue which will have a significant impact on who is entitled to protection under the ADA, and whether the different portions of the ADA will be interpreted with internal consistency.

The court of appeals' decision conflicts with the Second Circuit's decision in *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2nd Cir. 2000).[2] *Bartlett* was decided by the Second Circuit on August 30, 2000, only eight (8) days after the panel decision in Gonzales was issued.[3]

Bartlett involves a law school graduate who sought a testing accommodation on the New York State Bar Examination. Like Petitioner, the plaintiff alleged that she had a lifelong reading impairment. One of Ms. Bartlett's allegations is that she was disabled as to the major life activity of working. The Second Circuit in *Bartlett* explicitly adopted and utilized the EEOC's Title I regulations regarding the major life activity of working even though the plaintiff's claim was brought under Title II of the ADA.[4] Thus, the Second

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[2] The *Bartlett* case was itself before this Court on a prior Petition for Certiorari. 527 U.S. 1031, 119 S. Ct. 2388 (1999). The case was remanded to the Second Circuit in light of this Court's decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 1752 (1999), *Murphy v. United Parcel Serv.*, 527 U.S. 516, 119 S. Ct. 2133 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999).

[3] The Second Circuit was well aware of the court of appeals decision in this matter and the conflicts between the two. Despite the fact that the cases were decided a mere eight (8) days apart, the *Bartlett* opinion contains three (3) citations to the court of appeals decision in this matter.

[4] The DOJ promulgated the ADA regulations under both Title II and Title III of the ADA. Thus, even though the plaintiff in *Bartlett* alleged a violation of Title II, while Petitioner has alleged a violation of Title III, the analysis of whether to incorporate the EEOC's Title I regulations is (as explained more

Circuit accepted, in a non-employment context, the EEOC's interpretation that, with regard to the major life activity of working, a person should be compared not to the average person in the population, but to those with similar "training, skills, and abilities." The Second Circuit remanded the case to the district court for a more detailed factual analysis as to whether Ms. Bartlett was, in fact, disabled under the EEOC's "working" regulations.

The *Bartlett* court explained that the phrase "substantially limits" (and, accordingly, the definition of "disability") should be given a consistent meaning, if possible, throughout the various chapters of the ADA. 226 F.3d at 82-83. The court found it particularly fitting to interpret the ADA regulations consistently given the "cooperative spirit in which the regulations were promulgated." *Id.* at 83 (citing 1 Henry H. Perritt, Jr., *Americans with Disabilities Act Handbook*, §1.9 (3rd Ed. 1997)).[5]

The *Bartlett* court concluded that utilizing the Title I regulation on "working" in a Title II case would promote

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fully below) identical.

[5] In *Price v. National Bd. of Med. Examiners*, 966 F. Supp. 419 (S.D. W.Va. 1997), the court cited to the EEOC's Title I regulations even though *Price* was brought under Title III. Though that case did not deal specifically with the major life activity of working, the court agreed that "Congress clearly intended for the term 'disability' (and therefore, the phrase 'substantially limits') to have a uniform meaning throughout the ADA. Accordingly, wherever possible, the court must define the phrase 'substantially limits' in a manner consistent with each of the agencies' interpretations." *Id.* at 426, n. 2.

consistency in interpretation without dishonoring the intent of the DOJ in drafting the Title II regulations. According to the court, the preamble to the Title II regulations states that impairments must be evaluated based on a comparison to "most people." However, that preamble is vague because it does not explain whether "most people" refers to most people in the general population, or most people engaged in that particular life activity. Thus, the court concluded that the Title I and Title II regulations are not inconsistent and so, as a matter of policy, the two should be interpreted so as to be consistent. *Id.* at 83.

The court of appeals in this case came to different conclusions regarding the applicability of the EEOC's Title I regulations in this Title III action. The court stated that the Title III definition of "substantially limits" is "identical" to the EEOC's definition in the Title I regulations, except that the DOJ did not include a separate definition as to "working." The court reasoned that given the otherwise identical definitions, the DOJ must have intended to distinguish the treatment of "working" under its definition from its treatment under the EEOC's definition. That conclusion cannot withstand reasoned analysis. App., *infra*, at 23a-24a.

First, the DOJ did not include the definition of "substantially limits" in the regulation itself, but instead referred to it in the appendix to the regulations (in other words, the reference was akin to the DOJ's mention of "substantially limits" in the preamble to the Title II regulations as discussed in *Bartlett*). Second, the references to "substantially limits" in the Title I regulations and the Title III appendix are *not* identical. The Title I EEOC regulation specifically states that substantially limits means restricted "as compared to the average person in the general population." 29 C.F.R. §1630.2(j). Like the DOJ's Title II reference

discussed in *Bartlett*, the DOJ's Title III reference to "substantially limits" merely says that an individual should be compared to "most people." 28 C.F.R. Part 36, App. B. As the *Bartlett* court explained, this reference does not clarify whether the reference to "most people" means the "average person" or "most people who perform a particular major life activity." Thus, the court of appeals' reasoning in this case that the DOJ intended to have one clear definition of "substantially limits" which requires comparison to the general population for all major life activities is not persuasive.

The similarity between the Title II and Title III references to "substantially limits" is important because in *Bartlett*, the DOJ as *amicus curiae* argued that the EEOC regulations defining "substantially limits" with respect to working are *not* inconsistent with the DOJ's Title II regulations. 226 F.3d at 83. Thus, the DOJ's position as to its own regulations as articulated in the *Bartlett* litigation is inconsistent with the Sixth Circuit's interpretation of the DOJ's intent in promulgating its ADA regulations.

Also, it logically follows that the EEOC's regulations would be more detailed as they relate to the major life activity of working than the DOJ's regulations even if there was no intent to employ different definitions. The EEOC deals exclusively with employment matters, and its expertise relates to workplace issues. To the extent that the EEOC's Title I regulations and the DOJ's Title III regulations are not inconsistent, it makes sense, as the *Bartlett* court articulated, to use one set of regulations to inform the interpretation of the other. Such reasoning is particularly applicable here, where the regulations looked to for guidance are within the EEOC's particular expertise. The EEOC's regulations comprehend the distinction that working is different from other major life

activities and requires a different reference group. There is nothing inconsistent between this position and the DOJ's regulations. Moreover, where, as here, the accommodation requested addresses a barrier which precludes an individual from pursuing his chosen career, application of the EEOC's regulations is both logical and reasonable.

The Second and Sixth Circuits are clearly in conflict over this issue. This conflict concerns important issues of federal law and should be resolved by this Court. In the Sixth Circuit, an individual like Petitioner who alleged a failure to accommodate on a professional examination, would have to prove that he was "substantially limited" as to learning when compared to the average population. A similarly situated individual in the Sixth Circuit, however, who challenged a pre-employment test provided by an employer, and thus could bring a Title I action against that employer, would need to establish that he had a learning disability as compared to those with similar training, skills, and abilities. Moreover, if that same individual resided in the Second Circuit and alleged that Respondent had failed to accommodate him on the Step 1 (or some other licensing) examination, he would confront a distinctly different legal standard in order to establish his disability than someone taking the same examination on the same day in the Sixth Circuit.[6]

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[6] The issues as raised in the instant case and *Bartlett* continue to arise in the district courts. Since this case and *Bartlett* were handed down last year, the same issue has been raised in a case against the National Board of Medical Examiners in Illinois. There, the district court agreed with the Second Circuit that the Title I definition of substantially limits with reference to working is applicable to a Title III action alleging a failure to accommodate on the Step 2 examination. *Biank v. National Bd. of Medical Examiners*, 2000 WL 33172026 (N.D. Ill. 2000) (not yet reported

Additionally, Petitioner is confident that if the Title I definition of "substantially limits" as it relates to working is applied, he will clearly be able to demonstrate that he is disabled as to this major life activity. Much of the testimony of Respondent's "experts" related to the comparison of Petitioner to the average person in the population. Respondent's witnesses never compared Petitioner to his similarly situated peers because they contended that the law did not require them to do so. Petitioner's expert, Dr. Giordani, testified that when compared to other college students (i.e., not even to other medical students), Petitioner is clearly and substantially limited. Yet because neither the district court nor the court of appeals applied the Title I standard to Petitioner's allegation that he is disabled as to the major life activity of working, neither court considered the clear evidence that the "conditions, manner and duration" under which Petitioner is able to read differ dramatically from his similarly situated peers. That comparison needs to be made and, as indicated, Petitioner strongly believes he would prevail if the correct legal standard were applied.

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in F. Supp.) (App., *infra*, at 57a-66a).

CONCLUSION

The petition for a writ of certiorari should be granted.

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Decided and Filed August 22, 2000]

No. 99-1931

MICHAEL GONZALES, *Plaintiff-Appellant*,

v.

NATIONAL BOARD OF MEDICAL EXAMINERS, *Defendant-Appellee*.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 99-72190—Lawrence P. Zatkoff, Chief District Judge.

Argued : January 25, 2000

Before: NELSON, SUHRHEINRICH, and GILMAN, Circuit Judges.

SUHRHEINRICH, J., delivered the opinion of the court, in which NELSON, J., joined. GILMAN, J. (pp. 23-32), delivered a separate dissenting opinion.

OPINION

SUHRHEINRICH, Circuit Judge. Plaintiff Michael Gonzales ("Gonzales" or "Plaintiff") appeals the district court's denial of his request for preliminary injunctive relief under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.* ("ADA"). Plaintiff requested that Defendant National Board of Medical Examiners ("NBME" or "Defendant") be ordered to allow him extended time to take the United States Medical Licensing Examination Step 1 ("Step 1 Examination") because of an alleged disability.

I. BACKGROUND

In 1998, after successfully completing two years of medical school at the University of Michigan Medical School ("UMMS"), Gonzales applied to take the Step 1 Examination a prerequisite to proceeding with the third year of medical school. The Step 1 Examination is the first of three United States Medical Licensing Examinations ("USMLE") required for medical licensure in all states. The NBME administers the USMLE.

Before taking the Step 1 Examination on June 9-10, 1998, Gonzales asserted a learning disability and requested the NBME to allow him extended time, one and a half times the standard time, on the examination. He supported his request for test accommodations (which was endorsed by UMMS) with a psychological evaluation which Gordon L.

Ulrey ("Ulrey"), Ph.D.,[1] prepared in 1994 when Gonzales was an undergraduate student at the University of California at Davis ("UCD").

In 1994, Ulrey interviewed Gonzales and reported that Gonzales's main concern was low scores on multiple-choice tests, especially the Medical College Aptitude Test ("MCAT"). In addition to the interview, Ulrey based his evaluation of Gonzales on a battery of tests: 1) Wechsler Adult Intelligence Scale - Revised; 2) Wide Range Achieve Test - Revised, Level II; 3) Learning Efficiency Test, 2nd Edition; 4) Nelson-Denny Reading Test, Form E. Ulrey diagnosed Gonzales as having a learning disability.[2] Ulrey concluded that Gonzales "showed significant difficulty with the auditory sequential processing of information as seen by his performance on the arithmetic and digit span test as well as on both the visual and auditory memory tests for the Learning Efficiency Exam." Ulrey found it appropriate that Gonzales be given 50% more time for standardized testing,

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[1]Ulrey is an Associate Clinical Professor of Psychology at the UCD.

[2]Ulrey wrote that the pattern of errors on Gonzales's tests "strongly suggests an underlying processing disorder"; that "[b]oth Michael's problems with the sequential processing of information visually and auditorily as well as discrepancies between his cognitive level and his reading rate and reading comprehension suggest an underlying learning disability related to slowness in language processing"; and that "the pattern of cognitive skills as well as his ability to improve his performance significantly with increasing 50% time document both his learning disability and the need for the accommodation of increased time for tests."

and he suggested that Gonzales record lectures and review written lecture notes.

Ulrey also found that on the Wechsler Scale, Gonzales's verbal and performance skills ranged "from the average to superior range with verbal IQ 109, performance IQ 120 and full scale IQ 115."[3] Ulrey concluded that Gonzales has "significant strengths both in verbal conceptual ability as well as perceptual organization."

UCD had arranged accommodations for Gonzales during his third and fourth years of study based on Ulrey's report. Also on the basis of Ulrey's report, the UMMS provided Gonzales with basically the same accommodations he received during his third and fourth years at UCD: extended time on tests, assistance with note-taking, and

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[3]Ulrey reported that on the verbal test Gonzales revealed "significant strength in verbal conceptual ability on the vocabulary, comprehension and similarities verbal tests." He showed "excellent judgement and abstract reasoning on both comprehension and similarities." On the performance test, he exhibited "significant strength in perceptual organization as seen on both block design and object assembly," and he demonstrated "effective problem solving strategies on both block design and object assembly where he was able to solve even the most abstract designs with a high level of efficiency." On the achievement test, he had a "reading decoding standard score of 114, equivalent to the 82nd percentile and a written language or spelling standard score of 102, equivalent to the 58th percentile. Performance on the arithmetic calculation with standard time resulted in a score of 108 equivalent to the 70th percentile and with 50% more time improved his performance to a standard score of 138, equivalent to the 98th percentile."

permission to tape classroom lectures. UMMS allowed Gonzales double time on examinations.

The NBME referred Gonzales's request and documentation for extended time on the June 1998 Step 1 Examination to Dawn Flanagan, Ph.D., an expert in the field of learning disabilities.[4] Flanagan opined that Gonzales does not have a learning disability in reading and that the data in the area of written language is insufficient to diagnose a written language disorder. The NBME denied Gonzales's request for extended time, stating his impairment did not significantly impair a major life activity within the framework of the ADA.

In June 1998, when Gonzales took the Step 1 Examination without accommodations, he failed the examination.

Following its usual practice, the UMMS allowed Gonzales to begin his third-year clinical rotations before he learned the results of his June 1998 Step 1 Examination. When Gonzales learned that he had failed the examination, he had completed one month of a three-month surgical rotation. Gonzales chose to take a leave of absence to prepare to retake the Step 1 Examination.

Before submitting a request for extended time on the October 1998 Step 1 Examination, Gonzales consulted Bruno

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[4]Flanagan is a member of the American Psychological Association and the National Association of School Psychologists.

Giordani ("Giordani"), Ph.D.[5] Giordani diagnosed Gonzales as having a learning disability. Giordani based his diagnosis on Gonzales's history and on formal testing[6] and concluded that Gonzales met the criteria for Reading Disorder (315.00) and for Disorder of Written Expression (315.2). Giordani also found strengths in Gonzales's abilities. Giordani reported that Gonzales "scored within the average to superior ranges" on the intelligence test "with a marked difference between the Verbal and Performance subscales of 21 points (Verbal IQ = 100, Performance IQ = 121, Full Scale IQ = 109)."[7]

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[5]Giordani is an Associate Professor of Psychology in Psychiatry, Director of the Neuropsychology Clinic and Associate Director of the Neuropsychology Division, University of Michigan. Giordani is not board certified in neuropsychology by the American Psychological Association.

[6]The Neuropsychology Division administered the following assessment procedures to Gonzales: Wechsler Adult Intelligence Scale -- Third Edition (WAIS-III); Woodcock-Johnson Tests of Achievement -- Revised (WJ-R); Woodcock Reading Mastery Tests - Revised, Form G (WRMT-R/NU); Nelson-Denny Reading Test (N-D); Halstead-Reitan Neuropsychological Test Battery and Allied Procedures; Wechsler Memory Scale - Revised (WMS-R); Test of Variables of Attention (TOVA); Attentional Capacity Tests (ACT); Digit Vigilance Test; Minnesota Multiphasic Personality Inventory -w (MMPI-2); Patient History; Interview. The tests were administered by Lisa Provost, a Master's Level license psychologist.

[7]Giordani reported that Gonzales's scores on the Wechsler subtests ranged from "borderline impaired to superior." On academic achievement tests, Gonzales scored "within the above average to superior range" in mathematics "when solving basic

Giordani compared Gonzales's reading scores to those of fourth year college students and to college graduates. On reading comprehension tests where Gonzales's scores were compared to those of the general population, Giordani reported that Gonzales scored within the average range. Nonetheless, Giordani supported the medical school's decision to grant Gonzales extra time on exams and additional accommodations and recommended that "this accommodation be extended to other settings."

Gonzales presented Giordani's report with his request for extended time on the October 1998 Step 1 Examination. The NBME did not meet with or interview Gonzales. Rather, it sent the documentation Gonzales submitted with his request for accommodations to an expert in the field of learning disabilities, George Litchford, Ph.D.[8], who reviewed the materials and issued a report. Again, the NBME denied Gonzales's request for accommodations. In October 1998,

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written calculations, though his performance with word problems and related tasks fell somewhat lower and in the average to above average ranges." In cognitive skills, Gonzales demonstrated excellent performance on a conceptual problem solving task requiring general mental flexibility and efficiently [sic] in adapting one's responses based on feedback from the environment (Category Test)."

[8]Litchford is a clinical psychologist. He is a diplomat in clinical psychology in the State of New York and is a certified school psychologist in the Sate of New York. Dr. Litchford is also an approved neuropsychological examiner who performs certain certification reviews for the Office of Disabilities at New York State. He holds a Directorship of Psychological Services in the Psychology Department at the State University of New York.

Gonzales took the examination without accommodations and failed.

Gonzales applied to take the Step 1 Examination a third time and documented his request for accommodations. At the request of the NBME, Litchford reviewed the material and issued a report. The NBME denied his request for accommodations.

Before taking the Step 1 Examination a third time without accommodations, Gonzales filed an action in federal court under the ADA, alleging that the NBME illegally refused to accommodate his disability by failing to provide him with additional time to take the USMLE Step 1. Gonzales sought, *inter alia*, injunctive relief requiring the NBME to allow extended time on the Step 1 Examination.

After a four-day evidentiary hearing, the district court denied Gonzales's request for injunctive relief, finding that there was no substantial likelihood that Gonzales would succeed on his ADA claim because Gonzales is not disabled under the ADA. The district court rejected Gonzales's claim that he is disabled in the major life activities of reading and writing. The district court credited the NBME's experts, who opined that Gonzales "does not have a documented history of academic achievement below expectations that would support a diagnosis of a learning disability." Based on their testimony, the district court found that "Plaintiff's performance in both reading and writing tests fell within the average to superior range when compared to most people." The district court also

held that he was not disabled in the major life activity of working.[9]

Gonzales appeals, arguing that the district court erred in holding that he has no likelihood of success of establishing that he has a reading disability under the ADA. Second, he claims that the district court failed to address his writing disability. Third, Gonzales faults the district court's holding that he does not have a disability that affects the major life activity of working.

II. DISCUSSION

A. Standard of Review

The ADA includes injunctive relief as an appropriate remedy in disability discrimination. *See* 42 U.S.C.A. § 12188(a)(1) (West 1995) (incorporating the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3). We review a denial of a preliminary injunction for abuse of discretion and afford great deference to the district court's decision. *See Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross and Blue Shield Ass'n,* 110 F.3d 318, 322 (6th Cir. 1997). We will reverse a district court's denial of injunctive relief only if "the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.*

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[9]After the district court denied his request for injunctive relief, Gonzales took the Step 1 Examination a third time without accommodation and again failed.

District courts assess four factors in analyzing a preliminary injunction issue: (1) whether the plaintiff has a strong likelihood of succeeding on the merits; (2) whether the plaintiff will suffer irreparable injury absent the injunction; (3) whether issuing the injunction will cause substantial harm to others; and (4) whether the public interest will be furthered by the issuance of the injunction. *See id.* Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal. *See Michigan State AFL-CIO v. Miller,* 103 F.3d 1240, 1249 (6th Cir. 1997).

B. Merits

Title III of the ADA prohibits discrimination against persons with disabilities in professional examinations such as the USMLE Step 1:

> Any person that offers examinations . . . related to applications, licensing, certification, or credentialing for . . . professional, or trade purposes shall offer such examinations . . . in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C.A. § 12189 (West 1995). The DOJ regulations provide that an examination covered by this section be

selected and administered to accurately reflect the individual's aptitude or achievement level, rather than his impairment.[10]

A covered entity discriminates against a disabled individual when it fails to make "reasonable accommodations to known physical or mental limitations." 42 U.S.C. § 12112(b)(5)(A). The regulations implementing Title III of the ADA further clarify that such accommodations "may include changes in the length of time permitted for completion of the examination." 28 C.F.R. § 36.309(b)(2) (1999).

The NBME does not dispute that it is a "covered entity" under Subsection III of the ADA. The NBME also does not contest its obligation to provide reasonable accommodations, including extra time to take the Step 1, if a person has a disability. In fact, the NBME's own procedures

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[10]The relevant implementing regulation promulgated by the DOJ under Title III states that:

> [A]n examination covered by this section must assure that (i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure)[.]

28 C.F.R. § 36.309(b)(1)(i) (1999).

clearly contemplate the accommodation of individuals with learning disabilities.

Thus, the only question in this case is whether Gonzales is disabled within the meaning of the ADA. A person is disabled within the meaning of the ADA if that individual suffers from "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C.A. § 12102(2)(A) (West 1995).

The ADA does not define the terms "physical or mental impairment," "substantially limits," or "major life activities," and no agency has been given authority to issue regulations implementing the generally applicable provisions of the ADA. *See* 42 U.S.C. §§ 12101-12102; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, ---, 119 S. Ct. 2139, 2145 (1999). However, the Department of Justice ("DOJ"), which Congress assigned to write the regulations for Subchapter III of the ADA, defines "physical or mental impairment" as including "specific learning disabilities." 28 C.F.R. § 36.104 (1999). The NBME does not appear to dispute that Gonzales has a mental impairment.

The DOJ's regulations further define "major life activities" as including "walking, seeing, hearing, speaking, breathing, *learning*, and *working*." *Id.*, § 36.104(2) (emphasis added). The list is merely illustrative, not exhaustive, however, *cf. Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 780-81 (6th Cir. 1998) (Title I context); and courts have included reading and writing as major life activities under the ADA. *See, e.g., Bartlett v. New York State Bd. of Law Examiners*, 970 F. Supp. 1094, *aff'd*, 156 F.3d 321 (2d Cir. 1998), *vacated*, 119 S. Ct. 1999 (reading

and writing)[11]; *see generally Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 155 (1st Cir. 1998) (learning). In any event, the NBME does not dispute that reading and writing are substantial life activities.

Rather, this case turns on the key phrase "substantially limits." "Substantially limits" is defined in terms of a general population. The DOJ regulation states that an individual is substantially limited "when the individual's important life activities are restricted as to the condition, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R., pt. 36, App. B; *see also* 29 C.F.R. § 1630.2(j) (EEOC definition under Title I of "substantially limits"; defining an individual as substantially limited, for most purposes, if he is "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition,

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[11]The Second Circuit's opinion in *Bartlett* was vacated, not reversed, and the case was sent back for further consideration in light of the Supreme Court's recent decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 1752 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 119 S. Ct. 2133 (1999); and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999). Significantly, the Second Circuit had reversed the district court's holding that the plaintiff's ability to self-accommodate foreclosed a finding of disability. *See Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 327 (2d Cir. 1998), *vacated*, 119 S. Ct. 2388 (1999). This holding is called into question in light of the cited Supreme Court authority.

manner, or duration under which the average person in the general population can perform that same major life activity"). Thus, the ADA compares the performance of an individual who alleges a restriction in a major life activity to that of "most people."[12]

Gonzales claims that his mental impairments substantially limit him in the major life activities of reading, writing and working.

1. Reading

On appeal Gonzales claims that all the credible evidence established that his reading is restricted when compared to the "average" person. Gonzales points to his own testimony regarding his history of reading problems[13] as well

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[12]The Supreme Court recently noted that "substantially" suggest "considerable," "specified to a large degree," and "in a substantial manner" and that "substantial" means "considerable in amount, value, or worth," "being that specified to a large degree or in the main," "relating to or proceeding from the essence of a thing; essential," and "of ample or considerable amount, quantity or dimensions." *Sutton*, 119 S. Ct. at 2145. The Supreme Court's review of these definitions confirms that the ADA addresses impairments that limit an individual, not in a trivial or even moderate manner, but in a major way, to a considerable amount, or to a large degree. Under this standard, Gonzales is clearly not disabled under the ADA.

[13]Gonzales testified that throughout his life he has had difficulty reading both in and out of school. He also testified that he has trouble reading street signs and completing consumer

as the clinical evidence. He notes that Dr. Ulrey's report contains specific information detailing Gonzales's reading and other processing deficits, as well as his diagnosis, based on those deficits. Furthermore, Dr. Giordani, who testified at the hearing, concluded that Gonzales met the DSM-IV criteria for Reading Disorder after conducting a full neuropsychological evaluation of Gonzales.

Regarding Gonzales's reading impairment, the district court found that

> [w]hen compared to pooled norms, plaintiff[']s scores are squarely in the average to superior range. Of the more than twelve tests administered by Dr. Giordani in 1998, plaintiff scored significantly below average in only one, the Digit Span. In the Digit Span test administered by Dr. Giordani in 1998, plaintiff received a score of five, which is significantly below average and borderline impaired.

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transactions because of his reading problems.

The dissent would credit Gonzales's testimony that "he feels compelled to sign credit card receipts blindly because reading them would take him so long that it would make other customers angry, and that one of his attorneys had to read to him line by line the complaint they prepared on his behalf in the present case so that he could understand it." Although the district court did not specifically make the finding, we think Gonzales's verbal representation of his impairment is inconsistent with his success on the SAT and MCAT. Both tests are timed, and Gonzales took these exams without accommodation.

> However, plaintiff's score on the 1998 Digit Span test is clearly suspect. In 1994, plaintiff took another Digit Span test with Dr. Ulrey in which he received a ten, well within the average range. . . . Dr. Flanagan and Dr. Litchford testified at the hearing that because of the wide discrepancy between the two scores, the Digit Span test is an unreliable indicator of plaintiff's ability.

The lower court recognized Dr. Giordani as a "competent and accomplished" psychologist, but ultimately found the testimony of Drs. Litchford and Flanagan "more persuasive," and agreed with their conclusion that based on Gonzales's IQ scores, his performance fell within the average to superior range when compared to most people. Given these findings, the district court concluded that had not demonstrated that he suffered from "an ADA-defined disability" that substantially affects a major life activity.

Upon review of the record, we cannot say that the district court's findings or credibility assessments are clearly erroneous. Flanagan, Defendant's expert witness, testified at the evidentiary hearing that Ulrey's report did not support a diagnosis of Plaintiff having a reading disorder. She stated that the data she reviewed in terms of Gonzales's cognitive processes and reading achievement provided absolutely no evidence of an impairment. She presented a table of cognitive processes closely associated with reading achievement as assessed by Ulrey and Giordani and concluded that in "all areas that were assessed, all cognitive processes that were assessed that are found to underlie or help us explain or understand reading achievement, he performed in the average

to superior range."[14] Also, she stated that in nine subtests of verbal ability, verbal expression, and verbal comprehension that "his performance was in the average to superior range across a variety of those tasks." She further testified that in phonological processing, his score was in the average range; in visual auditory learning, he performed in the very superior range; and on an inductive reading task, he performed in the superior range.

Flanagan also addressed the one area, memory span, on which Gonzales scored in the impaired range on Giordani's evaluation. She noted that on Ulrey's evaluation Gonzales scored within the average range on the same test and that on another memory span test in Giordani's evaluation Gonzales's performance was average. She stated that the discrepancies in his scores suggest "a very unusual pattern of performance but one that is explained quite simply by possibly unreliability or a chance occurrence." She concluded that Gonzales clearly demonstrated average ability in memory span.[15]

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[14]The dissent criticizes Dr. Flanagan for relying on tests that measure Gonzales's cognitive skills, skills which predict reading ability. It should be noted that Dr. Flanagan also took into account the results of tests that reflected Gonzales's actual reading achievement level.

[15]The dissent faults Dr. Flanagan because she did not examine Gonzales. The dissent also attacks her conclusions because her methodology for assessing whether persons have learning disabilities involved a theoretical model that had not been empirically analyzed for purposes of treatment and diagnosis. The dissent therefore intimates that Flanagan's testimony might not

Litchford, Defendant's other expert witness, testified that:

> the reading test scores that were submitted were in the average to above average range on the Wide Range Achievement Test, the Woocock [sic] Reading Mastery Test and the Woodcock-Johnson Broad Reading.
>
> In addition, the Woodcock Reading Mastery Test . . . placed his reading total reading score, reading skill score and reading comprehension score in the average range.

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satisfy the "gatekeeper" requirements of Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993).

The dissent's reasoning is flawed. Although as an academic psychologist, Dr. Flanagan is not qualified to diagnose a reading disorder, she is qualified to analyze Gonzales's test results and express an opinion as to how his reading ability compares with that of the average person. Dr. Flanagan focused "on whether Mr. Gonzales has a reading disorder that rises to the level of a disability, that represents an impairment." The dissent goes too far in interpreting Dr. Flanagan's testimony as second-guessing the clinical diagnoses of Drs. Ulrey and Giordani.

Similarly, the fact that Dr. Flanagan relied on a theoretical model that had not been empirically analyzed for purposes of diagnosis and treatment does not preclude her from addressing the substantial limitation question. Dr. Flanagan did not purport to made a diagnosis or suggest treatment; she only determined whether Gonzales's test results were consistent with a substantial impairment in his reading ability. This she was qualified to do under the gatekeeper requirements of *Kumho* and *Daubert*.

> The scores were almost exactly equivalent to his full scale IQ. And all of his performances on that test were at a college graduate grade level, sixteen point nine.

Litchford also explained that the "age level norms" used on the Woodcock test do not approximate the average person as well as pooled norms do. On the Woodcock Reading Mastery, Gonzales scored in the average range even though these tests compared his performance to that of college graduates, his age peers, which is "a statistically driven standard of an average person at his age level." Litchford explained that "pooled norms," used on the Nelson-Denny Reading Test, "sample from the ninth, tenth, eleventh, twelfth, freshman college, second, third, and fourth [**24] year of college" and thus better approximate the average person.

Finally, it should be noted that, consistent with the NBME's experts, Giordani reported that Gonzales scored within the average range on reading comprehension tests, as compared to the general population. Thus, Gonzales's own expert undermines Gonzales's assertion "that despite his best efforts to work around his problem, he is still not able to read nearly as well as the average person." (Dissenting Op. at 4.) In short, Gonzales's impairment simply does not meet the DOJ's definition of "substantially limits," because he can read as well as the average person.

In *Pazer v. New York State Bd. of Law Examiners*, 849 F. Supp. 284 (S.D.N.Y. 1994), the court found "some merit to the argument that a disparity between inherent capacity and performance on a test may, in some

circumstances, permit the inference that an individual has a learning disability, even though that individual's performance has met the standard of the ordinary person." *Id.* at 287. However, the *Pazer* court rejected the idea that "such a disparity compels that conclusion as a matter of law," stating "to hold otherwise would compel the conclusion that any underachiever would by definition be learning disabled as a matter of law." *Id.* It gave credence to the defendant's expert who concluded that the plaintiff's "performance level on tests at issue was not consistent with a learning disability." *Id.*

Likewise, in the instant case, Defendant's expert, whom the district court credited, did not find a disparity between Plaintiff's ability and actual achievement. Flanagan testified that "[o]ne of the major indicators of just about every definition of a learning disability is a significant ability achievement discrepancy" but that Gonzales "is achieving commensurate with what is expected given his IQ."[16] In other words, Gonzales's achievements are not terribly inconsistent with his IQ scores.

Neither does Plaintiff fit within Congress's vision of the disabled population. In the introductory section to the ADA, "Findings and Purpose," Congress describes the disabled population it seeks to protect. It presents the disabled

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[16]Plaintiff urges this Court to rely upon *Doe v. NBME*, Case No. C-99-3124 WHO (ND Ca 1999), an unpublished decision. *Doe* has a factual similarity to the instant case in that its subject, a medical student, alleges a reading disability and seeks double time on the Step 1 Examination. In *Doe*, however, the court credited plaintiff's expert witnesses and the district court in the instant case credited Defendant's witnesses.

as isolated and segregated individuals; as individuals who often have "no legal recourse to redress . . . discrimination"; and as those who "as a group occupy an inferior status in our society and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C.A. § 12101 (a).

In high school, Plaintiff qualified for advanced placement classes and graduated with a grade point average of 4.3/5.0. He had no formal accommodations for learning disabilities during high school. Plaintiff scored 1050, an average score, on the SAT. He took the test without accommodations. Plaintiff earned a grade point average of 3.15/4.0 at Davis where he majored in physiology. He had accommodations during his third and fourth years at UCD. He took the MCAT twice without accommodations, improving his score on his second attempt by using skills suggested by counselors at Davis. His second MCAT score was high enough that the UMMS admitted him to its program. In short, Gonzales is not a member of the severely disadvantaged group Congress envisioned when it enacted the ADA. *See Bercovitch,* 133 F.3d at 155-56 (holding that the plaintiff, who was diagnosed with ADHD, was not "disabled" under the ADA because his learning disability did not affect his academic success, which did not fall below the average student of his age).

Even if self-accommodations enhanced Plaintiff's performance to that of most people, he is not disabled under the ADA. Recently, the Supreme Court ruled that in determining whether individuals are disabled under the ADA they should be examined in their corrected state. *See Sutton*, 119 S. Ct. at 2146; *see also Murphy v. United Parcel Serv., Inc.,* 527 U.S. 516, ---, 119 S. Ct. 2133, 2137 (1999). In

addition, in *Albertsons*, the Supreme Court held that an individual whose body developed coping mechanisms was not disabled within the framework of the ADA. *See Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162, 2169 (1999).

In short, there is record evidence to support the district court's conclusion that Gonzales does not have a reading disability for purposes of the ADA.

2. Writing

The district court did not separately address Gonzales's alleged writing disability. Gonzales correctly notes that the NBME acknowledged that his "diagnosis of a writing disorder is supported by the test data." The NBME also stated that "writing is not a construct that is measured by the USMLE, so that weak performance in this area would not impact your access to the USMLE program." Gonzales offered no evidence to refute this. In any event, for the reasons discussed above, Gonzales has failed to establish that he is substantially limited by any alleged writing impairment when compared to the average person.

3. Working

Alternatively, Gonzales's claim that he is disabled in the major life activity of working. He further alleges that the district court misunderstood that he was alleging an employment discrimination claim under Title I of the ADA, which governs employment, when in fact he is only alleging a claim under Title III.

The district court appears to have mistakenly analyzed Gonzales's argument as a claim under Title I. Notwithstanding, Gonzales's claim, properly understood, still fails for precisely the same reason that Plaintiff's allegations that he has a learning disability fails: when compared to "most people," his impairments do not substantially limit his ability to work. *See* 28 C.F.R. pt. 36, App. B (DOJ interpretative guidelines, Title III).

To get around this problem, Plaintiff contends that we should look to the EEOC's definition of "substantially limited" as it relates to the "major life activity of *working*", a definition that differs sharply from the definition applicable in every other context:

> The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as *compared to the average person having comparable training, skills, and abilities*. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (1999) (emphasis added). Gonzales claims that under this test, he must be compared with other persons who have completed their second year of medical school; and that when he is compared to this reference group, his difficulty with reading and writing is unquestionably an impairment.

We decline to transplant this definition from the Title I regulations into the Title III regulations. Like the EEOC in

Title I, the DOJ in Title III also included "working" in its list of "major life activities," and its definition of "substantially limits," is otherwise identical to the EEOC's "general population" definition of the same term in 29 C.F.R. § 1630.2(j)(1) for major life activities other than working. Thus, we must presume that if the DOJ wanted to modify the definition of "substantially limits" regarding the "major life activity of working" it would have expressly done so. In other words, the DOJ's silence is dispositive here. *See Price v. National Bd. of Med. Examiners,* 966 F. Supp. 419, 425 (S.D. W. Va. 1997) (holding that, because Congress authorized the DOJ to make issue regulations for Subchapter III, courts must give their decisions controlling weight unless arbitrary or manifestly contrary to the statute); *see generally Bragdon v. Abbott,* 524 U.S. 624, 642 (1998). *But see Bartlett,* 970 F. Supp. at 1099 (adopting EEOC test with respect to the major life activity of working), *and* 2 F. Supp.2d 388, 389-91 (S.D. N.Y. 1997) (denying motion for reconsideration; explaining that use of the major life activity of working standard from Title I is consistent with the spirit and letter of the ADA and DOJ "rule of interpretation" which sanctions the use of regulations from a different title to assist in interpreting a concept that is not addressed in its own regulations), *aff'd,* 156 F.3d 321 (2d Cir. 1998), *vacated,* 119 S. Ct. 2388 (1999). In any event, as previously noted, Congress did not confer authority on the EEOC (or the DOJ for that matter) to issue regulations regarding the proper interpretation of the term 'disability." *See Sutton,* 119 S. Ct. at 2145 (declining to decide the validity of or what deference is due the EEOC's regulations defining "disability" under the ADA because the parties accepted the regulations as valid).

Moreover, Plaintiff's claim to a disability in the major life activity of working is itself problematic.[17] Albeit in dictum, the Supreme Court recently questioned whether working can be deemed a "major life activity" under the ADA:

> We note . . . that there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.

Sutton, 119 S. Ct. at 2151 (quoting Tr. of Oral Arg. in *School Bd. of Nassau Co. v. Arline,* O.T. 1986, No. 85-1277, p. 15 (argument of Solicitor General)). It further noted that even the EEOC has reservations about including working as a major life activity and "has suggested that working be viewed as a residual life activity, considered, as a last resort, only '[i]f an individual is not substantially limited with respect to any other major life activity.'" *Id.* (quoting 29 CFR pt. 1630, App. § 1630.2(j)).

Finally, there is no support in the legislative history for Gonzales's position. Rather, the legislative history

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[17]The limitation claimed by Gonzales is in reality a limitation on his ability to read, not his ability to work - and he maintains that his impairments do not restrict his ability to do the work of a doctor.

suggests simply that Congress intended "substantially limits" to be interpreted as significantly restricted in a major life activity in relation to the average person within the population. The Senate Report from the Committee on Labor and Human Resources, submitted by Senator Kennedy, states as follows:

> Persons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.

S.Rep. 101-116, *23 (1989).[18] Given such scant support for Gonzales's proposed definition of substantially limited in the major life activity of working, we decline to adopt his view.

The district court did not err in finding that Plaintiff is not disabled in the major life activity of working.

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[18]As an example, the report states that a person who can walk ten miles continuously but experiences pain on the eleventh mile is not substantially limited in walking because most people are unable to walk eleven miles without suffering some discomfort. *See* S. Rep. 101-116, *23 (1989).

III. CONCLUSION

Because we conclude that Plaintiff has no likelihood of success on the merits, we need not consider whether he would otherwise be entitled to a preliminary injunction.

For the foregoing reasons, the district court's order denying injunctive relief is **AFFIRMED.**

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. Gonzales testified that he has great difficulty reading highway signs while driving, that in stores he feels compelled to sign credit-card receipts blindly because reading them would take him so long that it would make other customers angry, and that one of his attorneys had to read to him line by line the complaint they prepared on his behalf in the present case so that he could understand it. Assuming that he was telling the truth (and there is no suggestion to the contrary), then I cannot understand why he should not be considered "disabled" within the meaning of the ADA.

I.

A primary basis for the district court's conclusion that Gonzales does not have a reading disability is that he was able to get reasonably good grades through his first two years of college, and achieve average standardized test scores, without formal disability accommodations. If Gonzales's claim was that "getting reasonably good grades in school" and "achieving average standardized test scores" were major life activities within the meaning of the ADA, and that those

activities were the ones in which he was substantially impaired, the district court might have had a point. But that was not his claim, and, in any event, getting reasonably good grades in school and achieving average standardized test scores are not recognized as "major life activities." Instead, Gonzales claims that he is disabled in the major life activity of reading, which the NBME does not dispute *is* a major life activity under the ADA. *See, e.g., Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 324 (2d Cir. 1998), *vacated on other grounds*, 119 S. Ct. 2388 (1999); *Sweet v. Electronic Data Systems, Inc.*, No. 95 Civ. 3987 (MBM), 1996 WL 204471, at *6 (S.D.N.Y. Apr. 26, 1996) ("[R]eading itself is a major life activity independent of the major life activity of seeing."); *but see Hileman v. City of Dallas*, 115 F.3d 352, 355 n.4 (5th Cir. 1997) (expressing doubt that reading is a "major life activity" for purposes of the Rehabilitation Act).

Gonzales's reasonably good performance in high school and his first two years of college does not foreclose a finding that he has a reading disability. *Cf. Andrew Weis, Jumping to Conclusions in "Jumping the Queue,"* 51 STAN. L. REV. 183, 203 (1998) (book review) (observing that learning-disabled students often are caught in a "Catch-22" situation in that "if we excel in some tasks, then we must not possess a disability, but if we fail in other areas, then we must be just lazy, careless, or inattentive."). Indeed, Gonzales offered a plausible explanation for how he was able to get good grades without formal accommodations despite having a severe reading disability. He testified that he received very significant informal accommodations in high school (e.g., his teachers permitted him to redo unsatisfactory assignments and turn in untimed extra-credit projects). Gonzales also testified

that in college he was able to get fairly good grades without formal accommodations simply by employing strategies that allowed him to get by while doing the bare minimum of reading; for example, by tape-recording lectures and having his friends read their lecture notes to him. If getting reasonably good grades were the bottom line, then I would agree that Gonzales is not disabled. Gonzales, after all, is clearly not substantially worse off than the average person when it comes to getting reasonably good grades.

But a person's ability to get good grades is not the bottom line. If it were, then a student's ability to achieve reasonably high marks (by whatever means) without formal accommodations would, as a practical matter, foreclose a finding that he has a reading disability—a conclusion that I believe is incorrect. No one, for example, would argue that a blind student who is able to get good grades in college with the help of friends and an appropriately configured personal computer—but without any formal accommodation from the school—would not be considered "disabled" for the purposes of the ADA. Similarly, if a student with severe reading difficulties can get reasonably high marks in school even though it takes him three times as long as the average person to read the required course materials, it would make little sense to say that he does not have a disability in reading. One might say that he is overcoming his disability as far as getting good grades is concerned, but his method or manner of reading would still be substantially limited as compared to the average person.

I recognize that the Supreme Court in its 1999 trilogy of ADA cases, *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), *Sutton v. United Air Lines, Inc.*, 527 U.S.

471 (1999), and *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555 (1999), broadly held that an individual's ability to self-accommodate or self-correct through medication or treatment must be taken into account in ascertaining whether that person is "disabled" within the meaning of the ADA. The Supreme Court thus held that a hypertensive mechanic whose high blood pressure was controlled by medication was not disabled, *see Murphy,* 527 U.S. at 518-19, and that severely myopic prospective airline pilots whose eyesight with glasses was normal were also not disabled, *see Sutton,* 527 U.S. at 488-89.

Notably, the Supreme Court also held that a truckdriver with amblyopia, an uncorrectable condition that essentially left him with sight in only one eye, might not be "disabled" for the purposes of the ADA if his brain and body had adapted sufficiently so that his ability to see was not substantially impaired in comparison to the average person. *See Kirkingburg,* 527 U.S. at 565-66. The majority's analysis in the present case relies on *Kirkingburg*, reasoning that Gonzales has learned to self-accommodate in a similar fashion. I respectfully disagree.

In plain although admittedly unscientific terms, Gonzales's claim is that the part of his brain responsible for decoding written language is not wired the same as, and functions substantially worse than, that of the average person, even though in other respects his mental faculties are significantly better than average. If, despite this faulty "wiring," Gonzales had been able to adapt so that his ability to read was substantially no worse than that of the average person, then Gonzales would not be considered to have a reading disability under *Kirkingburg's* rationale. But that is

not Gonzales's claim. Rather, Gonzales has asserted that despite his best efforts to work around his problem, he is still not able to read nearly as well as the average person. I do not believe that working around a reading impairment by pursuing strategies in school that minimize the necessity for reading is the type of self-accommodation the Supreme Court had in mind in *Murphy*, *Sutton*, or *Kirkingburg*.

II.

In addition, the district court's conclusion that Gonzales had no substantial likelihood of success on the merits is seriously flawed because it is based on the finding that Gonzales does not have a disability within the meaning of the ADA. I do not believe that this finding is supported by the record before us.

Of the experts who testified or submitted reports to the district court, the only two who ever met Gonzales were Drs. Ulrey and Giordani. They both concluded that he had a very significant reading disability. The only expert who opined that Gonzales did not have a disability, or at least had not satisfied her that he had a disability, was Dr. Flanagan. Yet Dr. Flanagan never examined or even met with Gonzales, even though under the guidelines set forth by the American Psychiatric Institute's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) (4th ed. 1994), which the NBME accepts as the appropriate criteria for diagnosing learning disabilities, an interview or clinical examination is essential to making a competent diagnosis of a learning disability. *See* DSM-IV, p. xxiii ("The specific diagnostic criteria included in DSM-IV are meant to serve as guidelines to be informed by clinical judgment and are not meant to be used in a cookbook

fashion"). In other contexts, we accord substantial deference to the medical opinions of treating physicians. *See, e.g., Walker v. Sec'y of Health & Human Svcs.*, 980 F.2d 1066, 1070 (6th Cir. 1992) (social security disability benefits case). The same should be true for the opinion of an examining psychologist who has diagnosed a disorder that cannot be reliably detected through test scores alone.

Dr. Flanagan conceded that she did not diagnose Gonzales. She explained that she is an academician, not a clinical psychologist competent to diagnose learning disabilities in specific individuals. Instead, her opinion was based solely on second-guessing the conclusions reached by Drs. Ulrey and Giordani, who had examined Gonzales.

In particular, Dr. Flanagan testified that based on her review of the data submitted to the NBME by Drs. Ulrey and Giordani, she could find "absolutely no evidence" of an impairment. She also testified, however, that her methodology for assessing whether persons have learning disabilities was only a "theoretical model that has not been subjected to rigorous empirical analysis for the purposes of diagnosis and treatment." This leads me to question whether her testimony would satisfy the "gatekeeper" requirements of *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). Furthermore, to the extent Dr. Flanagan concluded that there was no indication that Gonzales had **any** learning disability, that conclusion was not shared by Dr. Litchford, the NBME's other expert witness. Dr. Litchford testified that the results of the tests administered by Dr. Giordani supported a finding of a writing disorder, although Dr. Litchford opined

that he did not believe that performance on the NBME would be affected by a writing disability.

Dr. Flanagan also never reviewed Gonzales's second or third applications for testing accommodations while those applications were actually pending before the NBME, even though the subject of the present litigation was Gonzales's third application for accommodations. Rather, she reviewed them only for the purpose of testifying on the NBME's behalf in the present case. Gonzales's attorney, in fact, made a motion in limine to limit Dr. Flanagan's testimony to the subject of her initial report in which she criticized Dr. Ulrey's report. The district court denied the motion, stating that "[t]his is merely a hearing, . . . not a trial."

Actually, because the "preliminary" injunctive relief that the district court denied was the lion's share of the relief Gonzales was seeking in this action, I believe that the district court should have considered more carefully what evidence would have been considered competent and admissible at trial. *See* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE: FEDERAL PRACTICE AND PROCEDURE § 2950, p. 241 (2d Cir. 1995 & Supp. 2000) (noting that when the district court consolidates the motion for preliminary injunctive relief with the trial on the merits, "in general the evidentiary rules applicable to trial should govern during a consolidated hearing" because the hearing "really is a trial on the merits").

Although it appears doubtful that private plaintiffs suing under Title 42 U.S.C. § 12188 III of the ADA are entitled to a jury trial, *see* (apparently authorizing only injunctive relief and attorney's fees in Title III suits brought

by private plaintiffs); *Abbott v. Bragdon,* 882 F. Supp. 181, 182 (D. Me. 1995) (suggesting that there is no right to a trial by jury in private plaintiffs' suits under Title III), the district court is still required to rely only on admissible and reliable expert testimony, even while conducting a bench trial. This is true even though district courts conducting bench trials have substantial flexibility in admitting proffered expert testimony at the front end, and then deciding for themselves during the course of trial whether the evidence meets the requirements of *Kumho Tire Co.* and *Daubert* and deserves to be credited. *See Ekotek Site PRP Committee v. Self,* 1 F. Supp. 2d 1282, 1296 n.5 (D. Utah. 1998) (concluding that district courts presiding over bench trials can decide questions of admissibility and reliability after the proffered evidence is presented at trial); *Bradley v. Brown,* 852 F. Supp. 690, 700 (N.D. Ind.) (granting a motion in limine to exclude unreliable expert evidence following the completion of a bench trial), *aff'd*, 42 F.3d 434 (7th Cir. 1994). By failing to conduct a *Daubert* analysis as to Dr. Flanagan's testimony (the district court's conclusory statement that it found the testimony of Dr. Flanagan "more persuasive" than that of Dr. Giordani does not constitute such an analysis), the district court effectively terminated Gonzales's case on the merits without employing the evidentiary safeguards that district courts are required to apply when genuine issues of material fact are in dispute—i.e., at a hearing or trial.

In any event, Dr. Flanagan's exclusive reliance on the test results and reports of Drs. Ulrey and Giordani is troublesome. She reasoned that because Gonzales performed well on tests that measured his cognitive skills, and because individuals' cognitive processes are "the best predictors of reading achievement," Gonzales's reading achievement

"ought to be within the average or better range of ability." I am unable to accept this reasoning.

Correlation is the probability that two factors, such as cognitive ability and reading ability, will accompany each other. A strong positive correlation between cognitive ability and reading ability would mean that, given a large enough sample of people with strong cognitive ability, a predictably large percentage would also have strong reading ability. But Gonzales is a person, not a sample. Dr. Flanagan's failure to examine or even meet with Gonzales leaves her stuck with relying on the argument that Gonzales's reading ability *ought* to be good because most people with cognitive ability as strong as Gonzales's also have good reading ability. This reasoning conflicts with, and leaves unexplained, Gonzales's testimony (as well as that of Dr. Giordani) to the effect that Gonzales is a member of the minority of individuals with strong cognitive ability but with very weak reading ability.

Furthermore, Dr. Litchford's testimony did little to support the NBME's claim that Gonzales does not have a learning disability. Rather, Dr. Litchford testified that the results of the tests administered by Dr. Giordani supported a finding of a writing disorder—although he doubted that having a writing disorder would hinder one's performance on the Step 1 exam. Dr. Litchford nevertheless forthrightly conceded that neither he nor the NBME had ever conducted any sort of empirical study to determine whether writing disabilities have any effect on how one performs on the NBME's examinations.

The question of whether a certain form of accommodation (i.e., more testing time) is required or

appropriate for a given disability is a question entirely separate from whether the individual has a "disability" in the first place. *See Shepler v. Northwest Ohio Developmental Ctr.*, No. 99-3079, 2000 WL 191496, at *7 (6th Cir. Feb. 9, 2000) (unpublished) (Gilman, J., dissenting) (observing that the question of whether the plaintiff in an ADA case has a disability should be kept analytically separate from other questions, such as whether certain proposed accommodations are required by the ADA); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 508 (7th Cir. 1998) (same); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 21-29, 49 (2000) (criticizing judicial opinions that deny relief under the ADA after bending over backwards to find plaintiffs not covered by the statute) ("After all, a finding that a person is protected by the ADA only leads to the central question of whether the [defendant] has improperly discriminated against the individual."). In view of the concession by Dr. Litchford (whose testimony the district court credited) that the results of the tests administered by Dr. Giordani supported a finding of a writing disorder, the district court's conclusion that Gonzales did not have any disability for the purposes of the ADA appears untenable.

There might well have been other reasons why Gonzales was not likely to succeed on the merits. Indeed, there might have been reasons weighing against granting injunctive relief even if Gonzales had established a likelihood of success on the merits. But the district court's decision to deny injunctive relief was based on its finding that Gonzales did not have any disability within the meaning of the ADA (and thus had no chance of success on the merits), and that finding, on the basis of the record before us, appears to me to have been clearly erroneous.

III.

I also disagree with the majority's statement that Gonzales does not "fit within Congress's vision of the disabled population." Maj. Op. at 15. Although it is indisputable that "[p]ersons with minor trivial impairments, such as a simple infected finger are not impaired in a major life activity," Maj. Op. at 19, I do not understand how the reading impairment described by Gonzales and Dr. Giordani can reasonably be compared to an infected finger.

Finally, I disagree with the majority's assertion that recognizing serious reading impairments of the sort described by Gonzales as "disabilities" would stretch the ADA well beyond its intended purpose. Congress anticipated that its definition of "an individual with a disability" would apply to "some 43,000,000 Americans." 42 U.S.C. § 12101(a)(1). Forty-three million is too small a number to include all of the people in the United States who require eyeglasses or contact lenses to see normally, *see Sutton,* 527 U.S. at 487 (observing that counting persons who can see normally with corrective lenses as "disabled" would drive the total of "disabled" persons well over one hundred million, a far greater number than Congress intended be covered by the ADA), but forty-three million is still a very large number—larger, I think, than the majority is willing to recognize.

IV.

I must confess that before delving into this case, I would have been skeptical that a person with a reading disability as serious as the one Gonzales insists he has would be able to survive the rigors of medical school and be capable

of practicing medicine successfully afterward. Nevertheless, Gonzales has apparently satisfied the faculty of one of this country's preeminent medical schools that he would make a very good physician, and I have little doubt that the faculty of the University of Michigan Medical School are better judges than I of who ought to be allowed to practice medicine.

For the reasons set forth above, I believe that the district court's finding that Gonzales does not have a disability within the meaning of the ADA is not supported by the record as it presently exists. The only finding consistent with Gonzales's testimony and the conclusions of the two experts who have met with and examined him is that he has a rather severe reading disability. Although the district court was obviously not required to credit Gonzales's testimony or that of Dr. Giordani, the district court's decision to credit the testimony of Drs. Flanagan and Litchford (particularly Dr. Flanagan) seems to me irreconcilable with the district court's recognition of Dr. Giordani as a "competent and accomplished psychologist." *Gonzale[s] v. Nat'l Bd. of Medical Examiners,* 60 F. Supp. 2d 703, 708 (E.D. Mich. 1999).

I would therefore vacate the order of the district court and remand this case for further proceedings. The district court could allow supplemental briefing or, in the exercise of its discretion, the taking of additional evidence on the subject of whether Gonzales is likely to succeed on the merits, and then, if necessary, address the other factors that are relevant in determining whether injunctive relief should be granted.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed August 10, 1999]

CASE NO. 99-CV-72190-DT

MICHAEL GONZALEZ,
Plaintiff,

vs.

NATIONAL BOARD OF MEDICAL EXAMINERS,
Defendant.

HON. LAWRENCE P. ZATKOFF

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the day of

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on plaintiff's Motion For a Preliminary Injunction. Defendant responded and plaintiff replied. This Court held a hearing during which the Court listened to four days of testimony beginning on Monday June 28, 1999. After considering the testimony and the documentary evidence submitted and for the reasons that follow, plaintiff's motion for a preliminary injunction is DENIED.

II. BACKGROUND

Plaintiff Michael Gonzales (hereinafter"Gonzalez" or "plaintiff") filed this complaint under Subsection III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (hereinafter"ADA") after the defendant National Board of Medical Examiners (hereinafter "NBME" or "defendant") twice denied his request for extra time to take Step 1 of the United States Medical Licensing Examination (hereinafter "Step 1 Exam"). Gonzales is a student at the University of Michigan Medical School. Medical school students complete their core classes after two years. In the third year, medical students undertake "rotations" through various medical specialties. In order to continue into the third year of medical school at the University of Michigan, students must pass the Step 1 Exam. Plaintiff successfully completed his first two years of medical school. Plaintiff took the Step 1 Exam twice without accommodation and failed both times.

Plaintiff claims that he has a learning deficiency (Reading Disorder and Disorder of Written Expression) that necessitates additional testing time on the Step 1 Exam. His impairment has been diagnosed by two different clinical psychologists, Dr. Ulrey and Dr. Giordani. Plaintiff sent the diagnoses to the defendant with his request for accommodations. Defendant reviewed the materials, sent them to an outside psychologist for an independent review, and concluded that plaintiff was not disabled under the ADA and therefore not entitled to an accommodation. Plaintiff seeks a preliminary injunction prohibiting the NBME from violating his rights and requiring the NBME to allow Gonzales double time to take the exam.

III. LAW

A. PRELIMINARY INJUNCTION

The Sixth Circuit has identified four factors as being of special importance in determining whether to issue a preliminary injunction:

> (1) the likelihood of plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served by the injunction.

In re DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir. 1985) (citations omitted). Under Fed.R.Civ. P. 65, the four factors are "to be balanced and are not prerequisites that must

be satisfied." In re Eagle-Picher Industries, Inc., 963 F.2d 855 (6th Cir. 1992).

The ADA specifically contemplates that injunctive relief is appropriate to remedy acts of discrimination against persons with disabilities. The ADA incorporates the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3, which states that whenever a person has engaged, or is about to engage, in a prohibited act, a temporary or permanent injunction is an appropriate remedy for the aggrieved party. 42 U.S.C. § 12188(a)(1); see also D'Amico v. New York State Board of Law Examiners, 813 F.Supp. 217 (W.D.N.Y. 1993).

B. AMERICANS WITH DISABILITIES ACT

Plaintiff brings his lawsuit under Subsection III of the Americans with Disabilities Act (hereinafter "ADA"). 42 U.S.C. § 12189. Subsection III of the ADA states in pertinent part:

> Any person that offers examination . . . related to applications, licensing, certification, or credentialing for . . . professional, or trade purposes shall offer such examinations . . . in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. 12189.

The purpose of the ADA is not "to allow individuals to advance to professional positions through a back door.

Rather, it is aimed at rebuilding the threshold ora profession's front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering the front door." See Price v. National Board of Medical Examiners, 966 F.Supp. 419, 421-22 (S.D. W.V. 1997) (quoting Jamie Katz & Janine Valles, The Americans With Disabilities Act and Professional Licensing, 17 MENTAL & PHYSICAL DISABILITY L. REP. 556, 561 (Sept./Oct. 1993).

A person is disabled within the meaning of the ADA if that individual suffers from "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(A). A covered entity discriminates against a disabled individual when it fails to make "reasonable accommodations to known physical or mental limitations." 42 U.S.C. § 12112(b)(5)(A). Therefore, to succeed on a ADA claim, plaintiff must demonstrate (1) that he is disabled, (2) that his requests for accommodations are reasonable, and (3) that those requests have been denied.

IV. ANALYSIS

Both parties agree that the ADA applies to the defendant NBME. 42 U.S.C. § 12189. Thus, the principal issue in this case is whether the plaintiff is disabled under the ADA. To determine whether a person has a disability under the ADA, this Court must undertake a two-step analysis. Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995). First, the person must have an impairment. Id. For certain impairments, such as learning disabilities, the impairment may be medically diagnosed by showing a discrepancy between a person's intellectual capabilities and

his performance. Second, the plaintiff must demonstrate that the impairment significantly restricts his ability to perform a major life function. Id.

A. PLAINTIFF'S DIAGNOSES

Plaintiff was first diagnosed with a learning impairment in 1994 by Dr. Ulrey while he was an undergraduate student at University of California at Davis. Dr. Ulrey administered a battery of tests and concluded that plaintiff had "verbal and performance skills ranging from the average to the superior." (Plaintiff' s Brief in Support of a Preliminary Injunction, p. 4). However, Dr. Ulrey also found that on one examination, plaintiff scored in the 10th percentile on verbal communication, and in the 18th percentile on reading rate. Therefore, Dr. Ulrey concluded that plaintiff had "an underlying learning disability related to slowness in language processing," and that the pattern of errors made by plaintiff on the different examinations "strongly suggests an underlying processing disorder." Id.

In March of 1998, anticipating the completion of his second year of medical school in May, plaintiff requested a test accommodation for the June 1998 Step 1 Exam. Defendant submitted plaintiff's materials to an independent psychologist for review. Upon the recommendation of the independent psychologist, defendant denied plaintiff's request because, according to the NBME, plaintiff did not demonstrate that he was significantly impaired. Plaintiff took the Step 1 Exam in June of 1998 without accommodation and failed to achieve a passing score by four points.

After failing the examination on his first attempt, plaintiff decided to get a second opinion to overcome defendant's concerns that plaintiff lacked the documentation necessary to demonstrate a disability under the ADA. On August 10, 1998, Dr. Bruno Giordani, a psychologist in the Neuropsychology Division of the University of Michigan Hospitals, administered to plaintiff the following assessment procedures through an assistant:

> (1) Wechsler Adult Intelligence Scale - Third Edition
> (2) Woodcock-Johnson Tests of Achievement - Revised
> (3) Woodcock Reading Mastery Tests - Revised, Form G
> (4) Nelson-Denny Reading Test
> (5) Halstead-Reitan Neuropsychological Test Battery and Allied Procedures
> (6) Wechsler Memory Scale - Revised
> (7) Test of Variables of Attention
> (8) Attentional Capacity Test
> (9) Digit Vigilance Test
> (10) Minnesota Multiphasic Personality Inventory - 2
> (11) Patient History
> (12) Interview

(Plaintiff's Ex. 20).

Dr. Giordani compared plaintiff's performance to fourth year college students and found that some of his scores were below average to impaired. After analyzing the scores, Dr. Giordani concluded that plaintiff suffered from a Reading

Disorder and Disorder of Written Expression. In August of 1998, plaintiff again requested an accommodation from defendant for the October examination and submitted Dr. Giordani's findings. Again, defendant refused. Plaintiff took the October Step 1 Exam without accommodation and again failed to achieve a passing score by four points. Defendant disagrees with Dr. Giordani's analysis and his decision to compare plaintiff's scores with education and age specific norms. Instead, defendant asserts that plaintiff s scores should be compared with a pooled group of individuals who purport to represent the "average" person in society. After comparing plaintiff's scores with pooled norms, defendant argues his test results are in the average to superior range and therefore plaintiff is not disabled under the ADA.

Plaintiff argues that he is disabled under the ADA in his major life activities of reading and learning and that defendant wrongfully denied his request for an accommodation on the Step 1 Exam. As stated above, the ADA requires plaintiff to demonstrate the following: (1) that he is disabled, (2) that his requests for accommodations are reasonable, and (3) that those requests have been denied. Congress defined disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). Therefore, to state a claim under the ADA, plaintiff must prove that he suffers from a mental or physical impairment and that such impairment substantially limits a major life activity. Andrews v. State of Ohio, 104 F.3d 803, 808 (6th Cir. 1997).

The ADA does not define the three phrases, "physical or mental impairment," "substantially limits," and "major life

activity," which are critical to an understanding of what constitutes a disability under the ADA. For purposes of this motion, defendant concedes that learning and reading are major life activities. (Defendant's Post-Hearing Brief, p. 3, fn. 2). The critical issue in this case is whether plaintiff's claimed impairment "substantially limits" his ability to read and learn. Although the text of the ADA is silent as to the definition of"substantially limits," legislative history and agency regulations provide insight.

B. LEGISLATIVE HISTORY AND AGENCY REGULATIONS

Legislative history offers some guidance as to the definition of "substantially limits." The report of the Senate Committee on Labor and Human Resources, the congressional committee which developed the ADA structure, notes that substantially limiting impairments cannot be "minor" or "trivial." S.REP. NO. 101-116 (1989). Rather, the impairments must restrict an individual's major life activity as to the "conditions, manner, or duration under which [the activity] can be performed in comparison to *most people."* Id. (emphasis added).

The authority to issue regulations to implement the ADA is split primarily among three government agencies. Sutton, 1999 WL 407488, *5. Congress authorized the Equal Employment Opportunity Commission (hereinafter "EEOC") to issue regulations regarding Subchapter I, which governs workplace discrimination. Congress authorized the Attorney General to issue regulations as to Part A of the Subchapter on public services, as well as Subchapter III, which addresses services provided by private entities. See 42 U.S.C.

§§ 12134, 12186. Finally, Congress authorized the Secretary of Transportation to issue regulations for provisions dealing with public transportation. See 42 U.S.C. §§ 12149, 12164; see also Price, 966 F.Supp. at 425.

Subchapter III (Section 12189) applies to this case and requires private entities that administer licensing examinations to provide accommodations for disabled persons taking the examination. The Department of Justice (hereinafter"DOJ"), charged with promulgating regulations under Subchapter III, defined"substantially limits" as follows: "when the individual's important life activities are restricted as to the condition, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R. pt. 36, app. B; Accord 29 C.F.R. 1630.2(j)(1)(ii). Therefore, in order to determine whether plaintiff is disabled for purposes of the ADA, his abilities must be compared with most people or, in other words, to the average person in the general population. Price, 966 F.Supp. at 425.

When compared to pooled norms, plaintiffs scores are squarely in the average to superior range. Of the more than twelve tests administered by Dr. Giordani in 1998, plaintiff scored significantly below average in only one, the Digit Span. In the Digit Span test administered by Dr. Giordani in 1998, plaintiff received a score of five, which is significantly below average and borderline impaired. However, plaintiff's score on the 1998 Digit Span test is clearly suspect. In 1994, plaintiff took another Digit Span test with Dr. Ulrey in which he received a ten, well within the average range. (Defendant's Ex. 66). Dr. Flanagan and Dr. Litchford testified at the hearing that because of the wide discrepancy between the two

scores, the Digit Span test is an unreliable indicator of plaintiff's ability.

Although this Court recognizes that Dr. Giordani is a competent and accomplished psychologist, this Court finds the testimony of Dr. Litchford and Dr. Flanagan more persuasive. Both Dr. Litchford and Dr. Flanagan testified that plaintiff does not have a documented history of academic achievement below expectations that would support a diagnosis of a learning disability. Although significant academic achievement does not negate a student's claim that he has a learning disability, the education history is relevant to the inquiry.[1] Moreover, both Dr. Litchford and Dr. Flanagan testified that Dr. Giordani's diagnosis is not supported by the test results. Plaintiff's performance in both reading and writing tests fell well within the average to superior range when compared to most people. Average, or even slightly below average, is not disabled for purposes of the ADA. See e.g. Sutton v. United Airlines, Inc., 1999 WL 407488, *8-11.

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[1]Plaintiff graduated from high school with a 4.3 grade point average (5.0 scale) and obtained an A in all the available advanced placement credits. He received a 1050 on the SAT without accommodation. According to the Princeton Review, a 1600 is the highest possible score and 1000 is the approximate average. At the University of California at Davis, he majored in physiology and graduated with a 3.15 (4.0 scale) grade point average. Plaintiff took the MCAT twice, receiving improved scores from the first time to the second time without accommodation. He has no history of accommodations before he entered the University of Michigan.

Even though some of plaintiff's test scores are on the low end of the average range, such as his scores on the Woodcock Johnson test, Dr. Litchford stated that "his verbal IQ is within the average range and his auditory memory performances from the Wechsler Memory Scale, although discrepant with his visual memory performances, are still within the average range." (Defendant's Ex. 72). Plaintiff's verbal IQ is 100, squarely in the average range. His performance IQ is 121, in the high average to superior range and his Full Scale IQ is 109, well within the average range. As compared to the general population, plaintiff's scores are overwhelmingly average to superior. Therefore, plaintiff has not demonstrated that he suffers from an ADA-defined disability which substantially effects a major life activity.

Further, to interpret the ADA otherwise would expand the reach of the ADA beyond that contemplated by Congress. Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." 41 U.S.C. § 12101(a)(1). This finding, enacted as part of the ADA, requires the conclusion that Congress did not intend to bring under the statute's protection all those persons whose level of reading or writing falls within the average or slightly below average range. To interpret the ADA's reach as broadly as plaintiff requests would be inconsistent with congressional findings and the purpose of the statute. Had the purpose been to include all individuals who are unable perform at an above-average level in writing or reading tests, Congress undoubtedly would have cited a much higher number of disabled persons. That it did not is evidence that the ADA's coverage is restricted to only those whose learning

disability places them significantly below average. See e.g. Sutton, 1999 WL 407488 at *8-11.

C. WORKPLACE DISCRIMINATION (SUBSECTION I)

In the alternative, plaintiff argues that even if this Court determines that plaintiff is not disabled in his major life activities of reading and writing, the Court should analyze this case under Subsection I of the ADA and consider whether plaintiff is disabled in his major life activity of working. The EEOC is charged with promulgating the regulations applicable to Subsection I. Plaintiff contends that when determining whether plaintiff is substantially limited as to the major life activity of working, this Court must compare plaintiff not to the average person, but to the "average person having comparable training, skills, and abilities." 29 C.F.R. 1630.2(j)(3)(i).

Subchapter III, not Subsection I, directly applies to this case and requires private entities that administer licensing examinations to provide accommodations for disabled persons taking the examination. Plaintiff now contends that defendant should be liable under Subchapter I of the ADA, which prohibits workplace discrimination. However, the instant case is not a workplace discrimination case and application of Subchapter I to the facts is problematic. First, in order for plaintiff to establish prima facie case of employment discrimination under ADA, he must show that: (1) he is disabled; (2) he is otherwise qualified for the position with or without reasonable accommodation; (3) he suffered an adverse employment decision; (4) the employer knew or had reason to know of the disability; and (5) the position remained

open. 42 U.S.C. § 12101 *et seq.* Plaintiff cannot demonstrate that he is otherwise qualified to be a doctor because he has not graduated from medical school and is not licensed to practice medicine.

More importantly, Subsection I does not apply to the defendant in this case. "[The ADA, Subsection I] provides that no *covered employer* 'shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to the job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.'" Sutton, 1999 WL 407488, *5 (quoting 42 U.S.C. 12112(a)) [emphasis added]; see also 42 U.S.C. § 12111(2) ("The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee"). The defendant is not employed by or seeking employment with NBME, but is taking the Step 1 examination administered by NBME. Therefore, where the ADA specifically covers NBME as an administrator of licensing examinations under Subchapter III, this Court cannot apply Subchapter I. Price, 966 F.Supp. at 426, fn. 2.

Even assuming that Subchapter I could apply to this case, the EEOC regulations are entirely consistent with the regulations promulgated by the DOJ. The EEOC stated that the term "substantially limits" means:

> (i) [u]nable to perform a major life activity that *the average person in the general population* can perform; or

> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major or life activity as compared to the condition, manner, or duration under which the *average person in the general population* can perform that same major life activity."

29 C.F.R. 1630.2(J)(1)(i-ii) (emphasis added).

In order to support his position that he should be compared to an age and education specific pool of people, plaintiff quotes from the EEOC's definition of"the major life activity of working" as it relates to the class of jobs for which a person is qualified, not to the definition of"substantially limits." See 29 C.F.R. 1630.2(J)(3)(i). Notwithstanding plaintiff's argument to the contrary, the EEOC defines "substantially limits" consistently with the DOJ and requires this Court to compare a plaintiff seeking accommodation under the ADA to the average person in the general population. Therefore, plaintiff has not demonstrated that he suffers from a disability that "substantially limits" a major life activity, as the phrase is defined in either the DOJ or EEOC regulations.

V. CONCLUSION

Plaintiff has not demonstrated that he has a disability that substantially limits a major life activity in comparison to the average person in the general population. Accordingly, because plaintiff has not demonstrated a substantial likelihood of success on the merits, he is not entitled to a preliminary injunction. See Six Clinics Holding Corp. II v. Cafcomp

Systems, 119 F.3d 393,399 (6th Cir. 1997) (a district court should make specific findings as to each factor unless fewer factors are dispositive of the issue). Having found that plaintiff cannot succeed on the first element of the preliminary injunction analysis, this Court need not address the remaining elements. Id. Therefore, plaintiff's motion for a preliminary injunction is DENIED.

IT IS SO ORDERED.

Dated: 10 AUG 1999

/s/_____
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed November 20, 2000]

No. 99-1931

MICHAEL GONZALES, *Plaintiff-Appellant*,

v.

NATIONAL BOARD OF MEDICAL EXAMINERS, *Defendant-Appellee*.

BEFORE: NELSON, SUHRHEINRICH, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Gilman would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Filed October 16, 2000]

No. 99 C 3390

VINCENT BIANK)
Plaintiff,)
)
v.)
)
NATIONAL BOARD OF)
MEDICAL EXAMINERS,)
Defendant.)
)

OPINION AND ORDER

DARRAH, District J.

PROCEDURAL HISTORY

On May 21, 1999, the plaintiff, Vincent Biank, sought interlocutory injunctive relief under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12189) to require the National Board of Medical Examiners (NBME) to provide an additional day beyond the standard one-day period on June 1,

1999, for the United States Medical Licensure and Examination (USMLE) Step 1 Exam. On May 27, 1999, the Honorable Milton I. Shadur entered a Temporary Restraining Order enjoining defendant from continuing its prior refusal to accommodate the plaintiff's disability by granting him double-time on June 1-2, 1999, to take the USMLE Step 1 Exam, as further set out below. That same day, defendant filed a notice of appeal with the 7th Circuit United States Court of Appeals (7th Circuit). On May 28, 1999, the 7th Circuit stayed the May 27, 1999 Temporary Restraining Order.

Plaintiff now seeks final mandatory injunctive relief before this court to require defendant to provide the plaintiff an additional one day test-taking time on October 19-20, 2000, for Step 2 of the USMLE because he has dyslexia, pursuant to Sections 12112, 12183, and 12189 of the ADA (42 U.S.C. §§ 12112, 12183, and 12189). The USMLE, as a private entity offering examinations related to licensing, is subject to the ADA under Section 12189. 42 U.S.C. § 12189. Therefore, his claim will be considered pursuant to that section. Plaintiff also seeks reasonable attorney fees and costs; this issue is reserved for a later determination, as may be required.

UNDISPUTED FACTS

Plaintiff is a fourth-year medical student at the University of Illinois Medical School in Rockford, Illinois. The NBME is a non-profit organization headquartered in Philadelphia, Pennsylvania that administers the USMLE, a three-step examination; the successful completion of each step is required for medical licensure in the United States. In order for an individual to take the USMLE, the individual must

either be enrolled in medical school or a graduate of a medical school. Examinees taking the Step 2 Exam are given eight hours of testing time on a single day to complete Step 2. If an examinee fails any Step of the USMLE, they may it take it again within 60 days, up to a total of three times per year. In order to be licensed as a medical doctor in the United States, plaintiff must pass the USMLE, successfully complete a residency program, apply for a license, and establish the appropriate ethical standards. Other than the per year limit, there is no overall limit to how many times an examinee who fails can take the USMLE. As long as an individual obtains a passing grade, the actual grade an examinee receives on the USMLE has no bearing on his or her ability to be licensed to practice medicine.

On November 20, 1998, the plaintiff requested an accommodation of double-time for the USMLE Step 1 Exam for the stated reason that he has a learning disability. By a letter dated, May 17, 1999, the NBME advised plaintiff that it would not provide the recommendation he requested. As set out above, on May 21, 1999, plaintiff filed this action before the district court seeking an order setting the matter for hearing on an expedited basis prior to June 1, 1999. On May 27, 1999, the district court granted plaintiff's request for preliminary injunctive relief, directing the NBME to allow plaintiff double-time in which to take Step 1 on June 1-2. On Friday, May 28, 1999, the 7th Circuit granted NBME's motion to stay the district court's order. Thereafter, plaintiff voluntarily took Step 1 on June 8, 1999, without the accommodation of one additional day and received a passing score of 192. The minium passing score for Step 1 was 179.

On March 28, 2000, plaintiff completed and signed his Step 2 application, selecting the testing period from September 1, 2000 to November 30, 2000. In connection with his Step 2 application, plaintiff also requested an accommodation of double-time that would allow him to take Step 2 on two days or one day more than otherwise provided. By letter dated June 27, 2000, the NBME advised plaintiff that upon review of plaintiff's application it could not provide the requested accommodation.

This matter now comes before the Court following a bench trial. The Court has considered the evidence, including the testimony of witnesses and exhibits, and has further considered the written arguments of counsel for the parties and the authority cited therein.

CONCLUSIONS OF LAW

The court has federal question jurisdiction over the plaintiff's claim (28 U.S.C. § 1331) and venue is proper pursuant to 28 U.S.C. § 1391(b) and (c). The NBME is subject to the ADA under 42 U.S.C. § 12189.

The purpose of the ADA is, in part, to provide "a clear and comprehensive national mandate for the elimination of discrimination * * and to provide clear, strong, consistent, enforceable standards addressing discrimination * * *." 42 U.S.C. § 12101(b)(1) and (2). 42 U.S.C. § 12189 prohibits an entity covered by the ADA from discriminating against a person with a disability by refusing reasonable accommodations for the disability.

The ADA defines "disability" as:

> "a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; b) a record of such an impairment; or c) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

The ADA authorizes the Equal Employment Opportunity Commission (EEOC) to issue regulations to carry out Subchapter I of the ADA (42 U.S.C. § 12116) and the Attorney General (Department of Justice or DOJ) to issue regulations to carry out the provisions of Subchapter III of the ADA (42 U.S.C. § 12186(b)). Courts have referred to regulations by both the EEOC and DOJ in construing the term "disability" as found in Section 12102. See e.g., *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944, 953-54 (7th Cir.2000); *Bartlett v. New York State Board of Law Examiners*, --- F.3d ---- (2nd Cir.2000); *Gonzales v. National Board of Medical Examiners*, --- F.3d ---- (6th Cir.2000).

The determination of whether a person has a disability under the ADA is made on an individualized case-by-case basis. *Bryne v. Board of Educ.*, 979 F.2d 560, 565 (7th Cir.1992). This determination is made through a three-step process: (1) whether the individual suffers from a "physical or mental impairment"; (2) whether the life activity on which the individual relies upon is a "major life" activity; and (3) whether the impairment "substantially limits" that major life activity. *See Bragdon v. Abbott*, 524 U.S. 624, 531, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998).

The DOJ defines the phrase "physical or mental impairment" as "[a]ny mental or psychological disorder such

as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 28 C.F.R. § 35.104 (1999). Major life activities include caring for one's self, walking, speaking, learning, and working. This list is illustrative, not exhaustive. *Bragdon*, 524 U.S. at 638-39, 118 S.Ct. 2196, 141 L.Ed.2d 540; 28 C.F.R. § 36.104(2) (1999).

The term "substantially limits" has been interpreted by both the EEOC and DOJ. The DOJ regulations do not define "substantially limits"; however, the Preamble to the DOJ's regulation states that "[a] person is considered an individual with a disability * * * when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R. 36, App. B. The Sixth Circuit, in *Gonzales,* found a medical student's reading disability did not substantially limit his abilities when compared to most people. The court adopted the DOJ's interpretation of "substantially limits" and rejected application of the definition found in the EEOC regulations because the DOJ was given the authority to implement regulations of Subchapter III of the ADA, pursuant to which the action was heard, and not the EEOC. *Gonzales,* --- F.3d at ----.

The EEOC defines "substantially limits" for major life activities other than working as: "[s]ignificantly restricted to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. 1630.2(j)(1)(ii) (1999).

For the major life activity of working, the term means: "significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to *the average person having comparable training, skills and abilities.*" 29 C.F.R. 1630.2(j)(3)(i) (1999) (emphasis added).

In *Bartlett,* the Second Circuit adopted the definition of "substantially limits" as used for the major life activity of working from the EEOC regulation into an action brought under Subchapter III. The *Bartlett* court found that while the DOJ's Preamble discussed "substantially limits" in terms of "most people," the regulation was ambiguous because it failed to explain whether most people referred to most people in the general population or most people engaging in a particular activity. Based on this and the need for the terms in the ADA to be consistent, the court used the EEOC definition of "substantially limits" with respect to working. *Bartlett,* --- F.3d at ----. In addition, the court noted that the DOJ's amicus curiae argued that the EEOC regulations defining "substantially limits" with respect to working was not inconsistent with the DOJ's regulations and advocated application of the EEOC definition.

This court agrees with the reasoning of the Second Circuit in *Bartlett* in which the court concluded the interpretation of the term "substantially limits" by the EEOC with respect to the major life activity of working should be used to evaluate a claim under Subchapter III of the ADA as the appropriate standard to measure this plaintiff's complaint in that regard. As support for concluding that interpretation reflects the intended statutory construction, the *Bartlett* court noted: (1) the DOJ does not explicitly define the term; whereas, the EEOC does; (2) the explanation in the Preamble is ambiguous; (3) consistency is needed throughout the ADA;

(4) the EEOC has been delegated authority to implement Subchapter I of the ADA; and (5) the DOJ agreed with the finding as demonstrated by its argument in its amicus curiae. Further support is found within the ADA's purpose statement, which states that one of the ADA's purposes is to provide "consistent * * * standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101. *Bartlett* presents a factual basis similar to the case at bar. However, one significant distinction should be noted: the plaintiff in *Bartlett* took and failed the Bar Examination three times and was then fired from the law firm she had worked at since graduating from law school. *Bartlett v. New York State Board of Law Examiners*, 970 F.Supp 1766, 1101-1103 (S.D.N.Y.1997). Unlike plaintiff in the instant case, as discussed in the Findings of Fact below, the *Bartlett* plaintiff's failure to pass the Bar Examination and her termination from employment clearly demonstrated she was unable to engage in the major life activity of "working" with the accommodation sought pursuant to the ADA.

42 U.S.C. §§ 12117, 12188, and 2000a-3 make injunctive relief available to a disabled person to enforce the provisions of the ADA. A court considers four criteria in deciding whether to grant injunctive relief, including whether: (1) the plaintiff has a reasonable likelihood of success on the merits; (2) the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction is not granted; (3) the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on defendant; and (4) the granting of the injunction will harm the public interest. *Plummer v. American Institute of Certified Public Accountants*, 97 F.3d 220, 229 (7th Cir.1996). A permanent injunction is not provisional in nature as is a temporary

injunction; rather, a permanent injunction is a final judgment. As such, a plaintiff seeking a permanent injunction must demonstrate not whether he has a reasonable likelihood of success on the merits but whether he has in fact succeeded on the merits. *Plummer*, 97 F.3d at 229.

FINDINGS OF FACT

1. Plaintiff is a fourth-year medical student with dyslexia, a physical or mental impairment.

2. Plaintiff is required to take Step 2 of the USMLE, which is a major life activity of working as a duly licensed medical doctor.

3. Plaintiff has not previously taken the Step 2 Exam and failed to pass; plaintiff has taken and passed the Step 1 Exam without an accommodation of additional time. Both the Step 1 and Step 2 Exams must each be taken in one 8-hour day.

4. Plaintiff has failed to prove that his impairment will substantially limit a major life activity without the requested accommodation either because:

a. plaintiff has failed to prove that his impairment of dyslexia will significantly limit his ability to pass Step 2 of the USMLE without the requested accommodation as compared with an average person in the fourth year of medical school; or

b. plaintiff has failed to prove that obtaining a low but passing score would significantly limit his participation in a medical residency program of his choice. The evidence

supports a contrary finding that any passing score would be of no effect regarding residency in the speciality in which plaintiff is interested.

5. Plaintiff, therefore, has failed to prove that he will be irreparably harmed if an injunction mandating an accommodation is not granted.

IT IS THEREFORE ORDERED that plaintiff's, VINCENT BIANK'S, complaint for a permanent mandatory injunction against NATIONAL BOARD OF MEDICAL EXAMINERS is hereby denied.

Supreme Court, U.S.
FILED
APR 23 2001
CLERK

No. 00-1476

IN THE
Supreme Court of the United States

MICHAEL GONZALES,
Petitioner,

v.

NATIONAL BOARD OF MEDICAL EXAMINERS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Americans with Disabilities Act ("ADA") defines "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102 (1994). Title III of ADA prohibits discrimination in the administration of licensing examinations, 42 U.S.C. § 12189 (1994), while Title I of ADA covers employment discrimination claims. 42 U.S.C. § 12112 (1994). This case arises under Title III.

The Department of Justice ("DOJ"), which was charged with issuing regulations under Title III, and the EEOC, which was charged with issuing regulations under Title I, both defined "major life activities" to include the purported life activity of "working." *See* 28 C.F.R. § 36.104 (2000) and 29 C.F.R. § 1630.2(i) (2000). However, the DOJ and EEOC adopted different definitions of the term "substantially limits," insofar as that term applies to the purported life activity of working. The DOJ regulation states that an allegedly disabled individual's restriction should be compared to the abilities of "most people," 28 C.F.R. pt. 36, App. B at p. 621 (2000), while the EEOC regulation states that the comparison should be to "the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i) (2000).

Thus, this case presents the following questions:

1. Whether the DOJ validly defined "major life activities" to including the concept of working.

2. Assuming working is a major life activity, whether the term "substantially limits" in Title III must be interpreted in the same fashion as the EEOC's Title I definition of "substantially limits" applicable to the major life activity of working.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent states that it is a not-for-profit corporation and has no parent company and no publicly-traded company owns ten percent or more of its stock.

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IN THE

Supreme Court of the United States

No. 00-1476

MICHAEL GONZALES,

Petitioner,

v.

NATIONAL BOARD OF MEDICAL EXAMINERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Respondent, National Board of Medical Examiners ("NBME"), submits this brief in support of the petition for writ of certiorari filed by the Petitioner, Michael Gonzales.

STATUTORY AND REGULATORY PROVISIONS

In addition to the statutory and regulatory provisions set forth in the Petition,[1] Respondent submits that the following provisions are also relevant:

> The DOJ's Title III regulations define "major life activities" as follows:
>
> > The phrase *major life activities* means functions such as caring for one's self, performing manual

[1] Petitioner's citation on pages 3 and 4 of the Petition to 29 C.F.R. §1630.3(j) is incorrect. The correct citation is 29 C.F.R. §1630.2(j).

> tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

28 C.F.R. §36.104 (2000) (emphasis in original).

The EEOC has adopted an identical definition of "major life activities" under Title I. 29 C.F.R. §1630.2(i) (2000).

STATEMENT OF THE CASE

The NBME is a not-for-profit corporation that develops and administers the United States Medical Licensing Examination ("USMLE"). *See* Joint Appendix filed in Court of Appeals at 1, 3, 661-62 (hereinafter "JA"). The USMLE consists of three parts, designated as Step 1, Step 2 and Step 3. JA 622. The USMLE is accepted by all fifty-four United States licensing jurisdictions for purposes of the examination requirement for medical licensure. JA 662. Qualified individuals take the various Steps at different points of their medical education, with Step 1 generally taken after the second year of medical school. JA 673-74.

Step 1 is a multiple-choice examination, where the student must answer questions after first reading information consisting of a single sentence or short vignettes. JA 665. Since May 1999, Step 1 has been administered on computer as a one-day examination and has been generally available six days a week throughout the year. JA 665. Although NBME places no limitation on the number of attempts a medical student can make to pass any Step of the examination, it does limit to three the number of times an applicant can take a given Step in a twelve-month period. JA 666, 665. NBME does not set a passing score for USMLE examinations, but rather, a passing score is recommended to the state medical licensing authorities. JA 666-67.

Medical students wishing to take Step 1 are informed of their ability to seek testing accommodations for disabilities covered by ADA. JA 659-60, 674-75. An applicant seeking

accommodation is required to submit documentation supporting the alleged disability as well as the accommodation that he or she is requesting. JA 676. In the majority of cases, NBME sends the documentation submitted to an independent expert to review such requests. JA 676. After reviewing the information submitted by the applicant, the independent expert submits a report to NBME and a determination is made as to whether the examinee is disabled under ADA and, if so, what accommodation should be provided. JA 676. In determining whether or not to grant accommodations, NBME does not attempt to make a diagnosis of the student; rather, it reviews the documentation submitted by the student to determine whether it supports the asserted diagnosis and the requested accommodation. JA 677-78.

As noted in the Petition, the instant case arose when Petitioner's third request for an accommodation to take Step 1 was denied by Respondent. Petitioner filed this suit, contending that he was disabled because he was substantially limited in the major life activities of reading, learning and working. App. 46a, 51a. After an evidentiary hearing, the district court denied Petitioner's request for a preliminary injunction because Petitioner could not demonstrate he was disabled for purposes of ADA. App. 39a-54a. Citing the DOJ's Title III definition of "substantially limits," the district court found that Petitioner's ability to read and write, as measured by his treating psychologist, "fell within the average to superior range when compared to most people." App. 49a. As for Petitioner's claim that he was substantially limited in the major life activity of working, the district court declined to evaluate Petitioner's claim under the EEOC Title I definition of "substantially limits" for the major life activity of working. App. 52a-53a.

On appeal, the Sixth Circuit affirmed in a 2-1 decision. App. 1a-38a. In evaluating Petitioner's claim that he was disabled in the major life activity of working, the Sixth

Circuit also declined to import into Title III the EEOC Title I definition of "substantially limits" for working, finding no evidence in the Title III regulations that the DOJ intended to incorporate the Title I standard into its regulations. App. 23a-24a. The Sixth Circuit also found Petitioner's claim based on the major life activity of working to be "problematic" given this Court's *dicta* in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999), questioning whether working could be included in the definition of "major life activities." App. 25a. According to this Court in *Sutton*, there was a conceptual difficulty in treating working as a major life activity, given the circular nature of arguing that the exclusion from working constituted a disability when "the question you're asking is, whether the exclusion itself is by reason of handicap." *Id.* at 492.

ARGUMENT

NBME believes the Court should grant certiorari in this case to resolve the important issues presented by the Sixth Circuit's decision in this case and the Second Circuit in *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2nd Cir. 2000), but not for the reasons Petitioner offers. Rather, certiorari should be granted for the following reasons:

First, given the overriding interest in safeguarding the public with respect to individuals who wish to become licensed to practice medicine in the United States, this Court should clearly articulate the applicable standards for evaluating requests for accommodations under Title III of ADA. While Respondent believes that the true distinction between the Sixth Circuit's decision here and *Bartlett* is a function of the different relation Step 1 has to the concept of working (*see infra*), the conflicting legal analyses in the two cases clearly promote, rather than minimize, the likelihood of future litigation over the issue. Specifically, the *Bartlett* decision will encourage future Title III litigants to include working among the major life activities they claim to be at

issue to invoke the more favorable definition of "substantially limits" the EEOC promulgated under Title I for that purported life activity.

Indeed, the potential for increased litigation in all United States jurisdictions where Respondent administers Step 1 is further enhanced by the rationale underlying the *Bartlett* decision. *Bartlett* incorporated the Title I definition of "substantially limits" into Title III in the interest of promoting a consistent interpretation throughout ADA. *Bartlett*, 226 F.3d at 82-83. The rationale underlying that conclusion creates a slippery slope that will encourage plaintiffs in future cases arising under Title III to argue that ***all*** major life activities—not just the purported major life activity of working—should be evaluated under the Title I standard for working as an alleged means of promoting a consistent interpretation of the term "substantially limits" throughout ADA. Indeed, this was the extreme position advocated by the DOJ in its initial *amicus* brief to the Second Circuit in *Bartlett*. *See* Brief for *amicus curiae* The United States at 16-17, 25-28, *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998) (No. 97-9162), *vacated*, 527 U.S. 1031 (1999) (mem.). While the Second Circuit did not adopt this view, its analysis in *Bartlett* would not preclude future litigants from advancing such claims.

Thus, unless this Court definitively addresses which interpretation of Title III's "substantially limits" definition is correct, the current state of the law will subject Respondent to increased litigation over whether requested accommodations should be granted. Respondent obviously recognizes its obligations to provide reasonable accommodations to individuals with disabilities, and has no vested interest in whether any particular individual is granted an accommodation in connection with Step 1 of the USMLE. However, unless Respondent has clear and definitive guidance on how requests for accommodations should be

evaluated, the integrity of the licensing examination it administers may be compromised. As a consequence, the public interest is threatened to the extent medical students who are not disabled receive accommodations and thereafter choose to become licensed as medical doctors.

Courts have repeatedly recognized the critical public interest implicated by Respondent's administration of a licensing examination that retains the highest levels of integrity. *See Goharderakshan v. National Board of Medical Examiners*, No. 98-0648-CV-W-4 at 7-8 (W.D. Mo. June 11, 1998) (in denying motion for TRO, court held that "[b]ecause the NBME is charged with administering the examinations required for licensing, it is necessarily responsible for protecting the public"); *Price v. National Board of Medical Examiners*, 966 F. Supp. 419, 422 (S.D. W.Va. 1997) (granting testing accommodations to persons not disabled under ADA "would allow persons to advance to professional positions through the proverbial back door," thereby undermining the integrity of the USMLE). In order to maintain the highest levels of test integrity, while at the same time meeting its obligations to accommodate individuals disabled under ADA, Respondent submits that this Court should address the tension between this case and *Bartlett* to provide uniform guidance on the meaning of "substantially limits" under Title III to licensing organizations throughout the United States. In that regard, Respondent does not believe this is the type of issue that should be allowed to "percolate" given the obvious value in maintaining a uniform standard for evaluating requested accommodations.

Finally, Respondent submits that this case squarely presents the issue of whether working may be properly considered a major life activity under ADA, a concept this Court questioned in *dicta* in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999). To the extent working is not a major life activity, the EEOC's definition of "substantially

limits" for working is invalid and can have no application to Petitioner's claim.

Since this Court made the above observation in *Sutton*, the lower courts have continued to grapple with this question, but, unfortunately, most courts have declined to substantively address this issue, choosing instead to assume *arguendo* that working is a major life activity. *See Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110, 1114 n.1 (D.C. Cir. 2001) (assuming *arguendo* that working is a major life activity); *Kellogg v. Union Pacific Railroad Co.*, 233 F.3d 1083, 1087 (8th Cir. 2000) (same); *Mullins v. Crowell*, 228 F.3d 1305, 1312-13 (11th Cir. 2000) (court reverses district court conclusion that working is not a major life activity; given that Court in *Sutton* did not resolve issue, court adhered to its prior precedent finding working to be a major life activity); *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.2d 247, 255 (6th Cir. 2000) (court concludes that working "is generally accepted as a major life activity . . ."); *Sinkler v. Midwest Property Management, Ltd.*, 209 F.3d 678, 685 n.1 (7th Cir. 2000) (court will continue to apply prior precedent recognizing working as a major life activity "until the Supreme Court definitively excludes working as a major life activity . . ."); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654 (5th Cir. 1999) (court definitively concludes that working is a major life activity). To the extent courts continue to defer resolution of this issue pending further guidance from this Court, *see*, *Sinkler*, *supra*, litigants will consume valuable judicial resources pursuing this issue without receiving any definitive guidance.

As for the reasons offered by Petitioner, NBME disputes Petitioner's suggestion that a purported need for "internal consistency" between the EEOC and DOJ regulations warrants review by this Court of the results reached by the Sixth Circuit in this case and the Second Circuit in *Bartlett*. In this case, the Sixth Circuit, in accordance with well-

established rules of statutory construction, concluded that had the DOJ wished to adopt a different definition for the term "substantially limits," insofar as it related to the purported major life activity of working, it could have expressly done so, as did the EEOC for claims arising under Title I. *See* App. 24a. As the Sixth Circuit succintly noted, the DOJ's silence on this point is dispositive of the issue. *Id. See also United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used . . . No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute"); *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers a statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history . . . '[there is no occasion] to examine the additional considerations of 'policy' that may have influenced the lawmakers in their formulation of the statute'" (citations omitted) (emphasis original)); *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) (rejecting petitioner's argument that statute should be given a "flexible" or "pragmatic" construction; "We are not at liberty to create an exception where Congress has declined to do so").

While, as a general proposition, uniform interpretation of a term throughout a statutory scheme is a laudable policy, it cannot be used to bootstrap a definition enacted by the EEOC for use under Title I into the regulatory scheme enacted by the DOJ under Title III, absent some indication (of which

there is none) that the DOJ intended to incorporate that definition into its Title III regulations.[2]

As for the claimed conflict between the Sixth Circuit's decision in this case and *Bartlett*, Respondent submits that the divergent outcomes in these two cases are driven as much by the facts of each case as they are driven by the differing legal analyses adopted by each court. In concluding the major life activity of working was implicated by the bar examination, the district court in *Bartlett* held the bar examination was the "only obstacle" between the plaintiff in that case and the practice of law. *Bartlett v. New York State Board of Law Examiners*, 2 F. Supp.2d 388, 393 (S.D. N.Y. 1998). In so holding, the district court specifically distinguished the bar examination from the test at issue in this case. *Id., distinguishing Price v. National Board of Medical Examiners*, 966 F. Supp. 419 (S.D. W.Va. 1997). Thus, Respondent respectfully submits that the true conflict between the Sixth Circuit's decision here and *Bartlett* turns more on this critical factual distinction, as opposed to the particular legal analysis used to assess each claim. Nonetheless, as noted *supra*, the potential risk to the integrity of the USMLE as a licensing

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[2] As an *amicus* in the *Bartlett* litigation, the DOJ suggested that incorporating the Title I definition of "substantially limits" for working was appropriate because the "concept of disability *should* have a uniform meaning." *See* Brief for *amicus curiae* The United States at 16, *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998) (No. 97-9162) (emphasis added), *vacated*, 527 U.S. 1031 (1999). However, the DOJ's *amicus* brief is bereft of citation to any legal principle that would mandate such a result, nor does the DOJ explain where in the Title III regulations it expressly adopted the EEOC definition from Title I. Given the foregoing, the DOJ's policy-based argument in *Bartlett* is entitled to little, if any, deference in this case. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (Court does not defer to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). Moreover, it is unclear whether the DOJ still adheres to the untenable position it articulated several years ago in the *Bartlett* litigation.

examination for medical students administered throughout the United States is of sufficient importance to warrant review by this Court of these issues.

CONCLUSION

Respondent respectfully requests that the Petition be granted for the reasons articulated herein.

Respectfully submitted,

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